(23,912)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 283.

D. J. McDONALD AND THE UNITED STATES FIDELITY AND GUARANTY COMPANY, PETITIONERS,

vs.

J. W. PLESS AND J. W. WINBOURNE, PARTNERS, &c., AS PLESS & WINBOURNE.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., SEPTEMBER 25, 1914.

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1 TRANSCRIPT OF RECORD.

THE UNITED STATES OF AMERICA,
Western District of North Carolina, To wit:

At a District Court of the United States for the Western District of North Carolina, Begun and Held at the Court-house, in the City of Asheville, on the 8th Day of January, in the Year of Our Lord One Thousand Nine Hundred and Twelve.

Present: The Honorable Jas. E. Boyd, District Judge for the Western District of North Carolina.

Among other were the following proceedings, to-wit:

Transcript from Superior Court of McDowell County, N. C.

Summons for Relief.

U. S. Circuit Court. Filed Mar. 27, 1911. W. S. Hyams, Clerk.

McDOWELL COUNTY:

In the Superior Court.

J. W. PLESS and J. W. WINBORNE, Partners, Practicing Law under the Firm Name Pless & Wineborne,
against
D. J. McDONALD.

Summons for Relief.

State of North Carolina to the Sheriff of McDowell County, Greeting:

You are hereby commanded to summon D. J. McDonald, the defendant above named if he be found within your county to be and appear before the Judge of our Superior Court at a court to be held for the County of McDowell at the Court-House in Marion on the 2nd Monday before the 1st Monday of March, it being the 20th day of Feb'y, 1911, and answer the complaint which will be deposited in the office of the Clerk of the Superior Court of said County, within the first three days of said term; and let the said defendant take notice that if he fail to answer the said complaint within
2 the time required by law, the plaintiff will apply to the court for the relief demanded in the complaint.

Hereof fail not, and of this summons make due return.

Given under my hand and seal of said court this 2nd day of Feb'y, 1911.

THOS. MORRIS,
Clerk Superior Court.

We acknowledge ourselves bound unto D. J. McDonald, the defendant in this action, in the sum of two hundred dollars, to be void, however, if the plaintiff shall pay the defendant all such costs as the defendant may recover of the plaintiff in this action.

Witness our hands and seals this 2nd day of Feb., 1911.

PLESS & WINBORNE. [SEAL.]

Endorsed: No. —. Pless & Wineborne vs. D. J. McDonald. Summons for Relief. Returnable to Feb'y Term, 1911, of the Superior Court for McDowell County. Received Feb. 2nd, 1911, served Feb. 2nd, 1911, by reading the within summons to D. J. McDonald and delivering him a copy of same. J. A. Laughridge, Sheriff, by F. A. Curtis, D. S.

NORTH CAROLINA,
McDowell County:

In the Superior Court.

J. W. PLESS and J. W. WINBORNE, Partners, Practicing Law in the Name of Pless & Winborne,

vs.

D. J. MCDONALD.

Affidavit.

J. W. Pless, being sworn, says he is a resident of McDowell County; and is a member of the firm of Pless & Wineborne, that the said firm have been employed and have represented the defendant in litigation in which they have received final judgment in
3 amount nearly $40,000.00; that they were employed to represent the defendant in this cause, who was the plaintiff in that cause, which was against MacArthur Brothers Company and others; that the defendant is justly indebted to the plaintiffs for services rendered in said cause for reasonable services, and as reasonable compensation in the sum of four thousand dollars ($4,000.00) and this amount is due to the plaintiffs by reason of services rendered in contract between the plaintiffs and defendant.

That the defendant is a non-resident of the State of North Carolina, and is a resident of the State of Illinois, and has property in the State of North Carolina, subject to attachment; that the said sum of four thousand dollars $4,000.00 is due the plaintiffs in this cause by the defendant over and above all counter claims and set offs the defendant has against the plaintiffs.

This the 2nd day of February, 1911.

J. W. PLESS.

Sworn to and subscribed before me this the 2nd day of Feb., 1911.

THOS. MORRIS, *C. S. C.*

NORTH CAROLINA,
McDowell County:

In the Superior Court, February Term, 1911.

J. W. PLESS and J. W. WINBORNE, Partners, Practicing Law under the Firm Name of Pless & Winborne,
vs.
D. J. MCDONALD.

Plaintiffs' Undertaking.

Whereas, the plaintiffs above named are about to apply for a warrant of attachment against the property of the above named defendant, D. J. McDonald;

Now therefore, we, J. W. Pless and J. W. Winborne, principals, and R. L. McCurry, as surety, undertake in the sum of $200.00 that if said warrant is granted and the defendant recover judgment in this action or the attachment be set aside, by order of the court the plaintiffs shall pay all costs that may be awarded to the defendant in the same and all damages which he may sustain by reason of such attachment.

This the 2nd day of February, 1911.

J. W. PLESS, *Prin.* [SEAL.]
J. W. WINBORNE, *Prin.* [SEAL.]
R. L. McCURRY, *Surety.* [SEAL.]

4 Justified before me and approved by me this the 2nd day of February, 1911.

THOS. MORRIS, *C. S. C.*

NORTH CAROLINA,
McDowell County:

In the Superior Court, February Term, 1911.

J. W. PLESS and J. W. WINBORNE, Partners, Practicing Law under the Firm Name of Pless & Winborne,
vs.
D. J. MCDONALD.

Warrant of Attachment.

To the Sheriff of McDowell County, Greeting:

It appearing by affidavit to the undersigned clerk of the Superior Court that a cause of action exists in favor of the plaintiffs against the defendant D. J. McDonald, for the sum of four thousand ($4,000.00) dollars, and that said defendant, D. J. McDonald, is a non-resident of the State of North Carolina, and that the plaintiffs are residents of said State of N. C., in the County of McDowell, and it further appearing that the plaintiffs have given the undertaking

as required by law, and that defendant has property in State sufficient to pay above indebtedness.

Now, therefore, you are commanded to forthwith *to* attach and safely keep all the property of the said defendant, D. J. McDonald, in said county or so much thereof as may be sufficient to satisfy the demand of the plaintiffs together with costs and expenses, and have you this warrant before the Judge of the Superior Court of McDowell County, in Marion, on the second Monday before the first Monday of March, it being the 20th day of February, 1911, with your proceedings thereon.

Witness my hand and the seal of my office, this the 2nd day of February, 1911.

THOS. MORRIS,
C. S. C., McDowell County, N. C.

I, Thos. Morris, Clerk of the Superior Court of McDowell County, do hereby certify that the foregoing 5 sheets are true and perfect copies of the affidavit, plaintiff's undertaking, and warrant of attachment in the suit of J. W. Pless and J. W. Winborne, practicing law in the name of Pless & Wineborne, vs. D. J. McDonald, as appears on file in my office.

5 Witness my hand and seal of my court this the 2nd day of February, 1911.

THOS. MORRIS,
Clerk of the Superior Court of McDowell County, North Carolina.

PLESS & WINBORNE
vs.
D. J. MCDONALD.

Within warrant of attachment received this the 2nd day of Feb., 1911. No property of defendant in McDowell County, except a certain judgment for $27,528.47 against MacArthur Brothers Co., Fidelity and Deposit Co., of Maryland, Meadows Co. and Carolina, Clinchfield & Ohio Railway in favor of defendant which said judgment I have attacred. I further return that I have this day delivered a certified copy of affidavit, plaintiff's undertaking and warrant of attachment, together with notice of attachment of said judgment which is of record in office of Clerk of Superior Court of McDowell County to Thos. Morris, Clerk of said Court, in whose office said judgment is recorded, to A. Hall Johnston, Local Agent for Fidelity & Deposit Co., of Maryland, to Jas. J. MacLaughlin, Ass't Sec'y of Meadows Co. and to J. S. Vawter, local depot agent at Marion for Carolina, Clinchfield & Ohio Railway.

I further return that at the time I served summons in this action on defendant, D. J. McDonald, that I delivered him copy of within affidavit, plaintiff's undertaking and warrant of attachment.

J. A. LAUGHRIDGE,
Sheriff of McDowell County,
By F. A. CURTIS, *D. S.*

NORTH CAROLINA,
McDowell County:

J. W. PLESS and J. W. WINBORNE, Partners, Cqmposing the Firm of Pless & Winborne,
vs.
D. J. MCDONALD.

Undertaking to Discharge Attachment.

Whereas, the property of the above named defendant, D. J. McDonald, has been attached herein by the plaintiffs, J. W. Pless and J. W. Winborne, partners composing the firm of Pless & Winborne, and the defendant desires a discharge of said attachment on giving security according to law:

Now, therefore, we, D. J. McDonald, the defendant herein, as principal, and the United States Fidelity and Guaranty Company of Baltimore Maryland undertake in the sum of eight thousand dollars that if the said attachment be discharged we will pay the plaintiff on demand the amount of the judgment that may be recovered against the defendant in this action, not exceeding the sum of eight thousand dollars.

This the 3rd day of February, 1911.

D. J. McDONALD, [SEAL.]
THE UNITED STATES FIDELITY AND GUARANTY CO.,
By PHILLIP R. MOALE,
Agent & Attorney in Fact.
THE UNITED STATES FIDELITY & GUARANTY CO.,
By ALF. S. BARNARD,
Agent and Attorney in Fact.

NORTH CAROLINA,
McDowell County:

In the Superior Court.

J. W. PLESS and J. W. WINBORNE, Partners, Composing the Firm of Pless & Winborne,
vs.
D. J. MCDONALD.

Order Vacating Attachment.

The defendant having appeared in this action, and applied to discharge the attachment on giving security, and the said defendant having delivered to the court an undertaking in due form of law which has been approved by the court:

It is ordered that the attachment issued in this action on the 2nd day of February, 1911, be and the same is hereby discharged and

vacated, and the defendant is released therefrom in all respects. It is further ordered that all property attached, if any, now in the sheriff's possession, be paid and delivered to the said defendant or his agent and released from said attachment.

This the 6th day of February, 1911.

THOS. MORRIS,
Clerk Superior Court of McDowell Co.

7 STATE OF NORTH CAROLINA,
McDowell County:

In the Superior Court.

J. W. PLESS and J. W. WINBORNE, Partners, Composing the Firm of Pless & Winborne,
vs.
D. J. MCDONALD.

Petition for Removal to U. S. Circuit Court.

To the Honorable the Superior Court of the County of McDowell, State of North Carolina:

Your petitioner, the defendant in the above entitled case, respectfully shows unto the court that the above entitled cause is a suit or civil action commenced for the recovery of money by the plaintiffs against him in said court by the issuance of a summons from said court in favor of the plaintiffs and against the defendant, dated on the 2nd day of February, 1911, returnable before the Judge of said court at a term thereof to be held for the County of McDowell, at the Court house in Marion, on the second Monday before the first Monday of March, it being the 20th day of February, 1911. The defendant filed this petition before the time when *it* is obliged to answer or demur to the complaint in said case.

That the matter in controversy in said action exceeds, exclusive of interest and costs, the sum or value of two thousand dollars; the amount sued for by the plaintiffs against the defendant is the sum of four thousand dollars, besides interest thereon.

Your petitioner further states that the controversy in said suit is, and at the time of the commencement of this suit was, between citizens of different states, and that your petitioner, the defendant, in the above entitled suit was, at the time of the commencement of the suit, and still is a resident of and a citizen of Aurora, in the County of Kane, in the State of Illinois, and a non-resident of the State of North Carolina, and that the plaintiff-, J. W. Pless and J. W. Winborne, were then and still are residents and citizens of the City of Marion, in the County of McDowell, State of North Carolina, and in the Western District of North Carolina.

Your petitioner further states that the controversy in this action between the plaintiffs herein and the petitioner, the defendant herein,

can be fully determined as between them in the Circuit Court
8 of the United States for the Western District of North Carolina, said Circuit Court having jurisdiction under the laws of the United States to try and determine the same.

And your petitioner offers herewith a good and sufficient surety or bond for his entering in the Circuit Court of the United States for the Western District of North Carolina, at Asheville, on the first day of its next session a copy of the record in this suit, and for paying all costs that may be awarded by said Circuit Court, if said court shall hold that this suit was wrongfully or improperly removed thereto.

And he prays this Honorable Court to proceed no further herein, except to make the order of removal required by law and to accept the said surety and bond and cause the record herein to be removed into the said Circuit Court of the United States in and for the Western District of North Carolina, at Asheville.

D. J. McDONALD.

MOORE & ROLLINS,
Attorneys for Petitioner.

STATE OF NORTH CAROLINA,
County of Buncombe:

D. J. McDonald, being duly sworn, doth say that he is the petitioner in the foregoing petition; that he has read the foregoing petition and knows the contents thereof, and that the same is true, except as to matters therein stated on information and belief, and as to those he believes it to be true.

D. J. McDONALD.

Sworn to and subscribed before me this 3rd day of February, 1911.
HARMON P. GUDGER,
Notary Public in and for Buncombe County, North Carolina.

My Commission expires Sept. 19, 1912.

Filed Feb'y 6th, 1911. Thos. Morris, C. S. C.

9 NORTH CAROLINA,
McDowell County:

In the Superior Court.

J. W. PLESS and J. W. WINBORNE, Partners, Composing the Firm of Pless & Winborne,
vs.
D. J. McDONALD.

Order of Removal.

On the pleadings and proceedings herein and on the petition and bond filed herein by the defendant, under the provisions of the Act of Congress of the United States and on motion of Moore & Rollins,

attorneys for the defendant, D. J. McDonald, it is ordered that the bond offered by the defendant be approved, and that the Superior Court proceed no further in this action, and that this action be removed into the Circuit Court of the United States for the Western District of North Carolina, at Asheville.

This the 20th day of February, 1911.

HENRY P. LANE,
Judge of the Superior Court.

NORTH CAROLINA,
McDowell County:

In the Superior Court.

J. W. PLESS and J. W. WINBORNE, Partners, Composing the Firm of Pless & Winborne,
vs.
D. J. MCDONALD.

Bond for the Removal of This Cause to the United States Circuit Court for the Western District of North Carolina.

Know all men by these presents: That D. J. McDonald, as principal, and the United States Fidelity and Guaranty Company of Baltimore, Maryland, as surety, are held and firmly bound unto J. W. Pless and J. W. Winborne, partners composing the firm of Pless & Winborne, and all other persons whom it may concern, in the penal sum of five hundred dollars, for the payment of which well and truly to be made, we bind ourselves, our heirs, representatives, successors and assigns, jointly and severally, firmly by these presents.

Yet upon these conditions: The defendant, D. J. McDonald, having petitioned the Superior Court of McDowell County, in the State of North Carolina, for the removal of the above entitled cause pending in said court, wherein J. W. Pless and J. W. Winborne, partners, composing the firm of Pless & Winborne, are plaintiffs, and D. J. McDonald, is defendant, to the Circuit Court of the United States for the Western District of North Carolina, at Asheville.

Now, therefore, if the defendant, D. J. McDonald, the petitioner, shall enter into the said Circuit Court of the United States for the Western District of North Carolina, at Asheville, on the first day of its next session a copy of the said suit, and shall well and truly pay all costs that may be awarded by said Circuit Court of the United States, if the said court shall hold that this suit was wrongfully or improperly removed thereto, then this obligation to be void; otherwise to remain in full force and virtue.

Witness our hands and seals this the 3rd day of February, 1911.

D. J. McDONALD. [SEAL.]
THE UNITED STATES FIDELITY AND GUARANTY COMPANY,
By PHILLIP R. MOALE, *Agt. & Att'y in Fact.*
THE UNITED STATES FIDELITY & GUARANTY COMPANY,
By ALF S. BARNARD, *Agt. & Att'y in Fact.*

NORTH CAROLINA,
McDowell County:

Superior Court.

I, Thos. Morris, Clerk Superior Court of said county, do hereby certify that the foregoing is a true copy of the record in cause: Pless & Winborne vs. D. J. McDonald as appears of record in this office.

Witness my hand and official seal.

This the 25th day of March, 1911.

[SEAL.]

THOS. MORRIS,
Clerk Superior Court.

11 *Bill of Complaint.*

U. S. Circuit Court. Filed Apr. 14, 1911. W. S. Hyams, Clerk.

UNITED STATES OF AMERICA,
Western District of North Carolina:

In the United States Circuit Court for the Western District of North Carolina.

J. W. PLESS and J. W. WINBORNE, Partners, Practicing Law under the Firm Name Pless & Wineborne,

vs.

D. J. MCDONALD.

Complaint.

The plaintiffs complaining of the defendant, allege:

1. That on or about the 15th day of April, A. D., 1909, the plaintiffs were employed by the defendant to represent him in two suits then just instituted by J. G. Merrimon, Esq., in the Superior Court of McDowell County, North Carolina, which suits were in behalf of D. J. McDonald, and against McArthur Brothers Company, the Carolina, Clinchfield & Ohio Railway, and others, one suit, however, being only against MacArthur Brothers Company and was for the recovery of more than twenty thousand ($20,000.00) dollars for railroad construction work in the State of Virginia, and the other was against said MacArthur Brothers Company, said Railway Company, and others, and was for the recovery of an alleged claim in the total amount of thirty-four thousand seven hundred thirty-nine & 85/100 ($34,739.85) dollars claimed as due for railroad construction work in McDowell County, North Carolina.

2. That the plaintiffs made unusual preparation in said causes, assisted in the preparation of all pleadings, motions and other papers filed for the plaintiff in said causes, made many trips to distant points in the United States and participated in the trial of the causes for which a special term of court was called and held, occupying nearly two entire weeks, in which suits the plaintiff recovered $6,916.15, in the suit involving the work in Virginia, which amount was accepted by the plaintiff in compromise after allowing proper

credit to said company, and in the second suit the plaintiff recovered
12 $27,528.47, with interest from January 10th, 1909, with all costs, the total amount when collected being as plaintiffs are informed about $31,000.00.

3. That for many months prior to the trial of said causes the plaintiffs were the only counsel representing the said McDonald residing in the State of North Carolina, and during the trial the plaintiffs were the only attorneys appearing for the plaintiff residing in this State and the plaintiffs actively participated in the trial and rendered all the services of which they were capable.

4. That both parties to the said suits appealed to the Supreme Court from the judgment of the Superior Court and in the preparation of the records, arranging the transcripts, preparing briefs and arguments both of the plaintiffs in this cause devoted great time and labor and the said J. W. Pless devoted almost his exclusive time and labor to said work and participated in the argument in the Supreme Court, which said court confirmed the judgment in the lower court, and the said D. J. McDonald, has collected, as plaintiffs are informed, the whole amount of his said judgments.

5. That by reason of said employment, and on account of the labor of the plaintiffs for the said defendant in this cause, in the preparation and trial of the said causes, the defendant, D. J. McDonald, is indebted to the plaintiffs over and above all payments, off-sets, and counter-claims, and the plaintiffs are entitled to recover of him the sum of four thousand ($4,000.00) dollars, with interest from the date of the institution of this suit.

Wherefore, the plaintiffs pray judgment against the defendant, D. J. McDonald, in the sum of four thousand ($4,000.00) dollars, with interest from the date of institution of this cause, the costs of this action to be taxed by the clerk, and for such other and further relief as to the court may seem just, right and proper.

D. E. HUDGINS,
A. HALL JOHNSON,
LOCKE CRAIG,
Attorneys for Plaintiffs.

NORTH CAROLINA,
McDowell County:

J. W. Pless, first being duly sworn, deposes and says: that he is — the plaintiffs in the above entitled action and has full right and authority to make this affidavit; that he has read the foregoing
13 complaint and that it is true of his own knowledge except as to such matters and things as are therein stated upon information and belief, and as to those matters and things he believes it to be true.

J. W. PLESS, *Affiant.*

Sworn to and subscribed before me this the 12th day of April, A. D., 1911.

[SEAL.]

THOS. MORRIS,
Clerk of Superior Court of McDowell County, North Carolina.

C. S. Fee due 50¢.

Answer.

U. S. Circuit —. Filed Sep. 21, 1911. W. S. Hyams, Clerk.

In the Circuit Court of the United States for the Western District of North Carolina, Fourth Circuit, at Asheville.

J. W. PLESS and J. W. WINBORNE, Partners, Practicing Law under the Firm Name of Pless & Winborne,

vs.

D. J. MCDONALD.

Answer.

The defendant answering the complaint of the plaintiff-, says:

I. That in answer to the first allegation of said complaint, he says that he has paid to the plaintiffs the sum of $1,778.85 in said causes mentioned in said paragraph, besides has paid to them in the way of expenses and for the trips made by them in behalf of the plaintiff, various sums, but sufficient for all expense money, which is as much as said services so rendered by the plaintiffs in behalf of the defendant, as alleged in said paragraph are worth, and more, as the defendant is informed and believes that it is not true that one of said suits, that is the one against MacArthur Brothers Company, was for the recovery of more than $20,000 for railroad construction work in the State of Virginia; that as was well understood by the plaintiffs, the said suit was for the recovery of $6,915.15, which covered the balance of the principal and interest of said claim.

14 II. That the allegations contained in paragraph two of said complaint are untrue, except that it is true that the plaintiffs "recovered $6,915.15 in a suit involving the work in Virginia, which amount was accepted by the plaintiff in compromise after allowing credit to said company." It is true that the plaintiff, J. W. Pless, made two trips to different points in the United States but it is untrue "that the plaintiffs made unusual preparation in said causes, assisted in the preparation of all pleadings, motions and other papers filed for the plaintiff in said causes." It is true, however, that there was filed on behalf of the plaintiffs by J. G. Merrimon, Esq., one of his said attorneys, all of said pleadings in the case, without any preparation or participation on the part of the plaintiffs, but it is true that the plaintiffs accepted said pleadings of the said J. G. Merrimon, Esq., which were drawn alone by the said Merrimon, as sufficient in said cases.

III. That while it is true that for a time prior to the actual trial of the said causes the plaintiffs were the only local counsel representing in said litigations the said D. J. McDonald, it is not true that they were the only counsel representing the plaintiff in said litigations, but that the plaintiff employed to assist them, as leading counsel in the case, in said litigations during the time employed in the actual work connected with the same, one Marshall McCormick, Esq., a very prominent lawyer of the State of Virginia, who actually took

charge of and managed the case for the plaintiff and rendered such services as were required of him in and about the case and for which he was paid by the plaintiff his fee charged in the cause, to-wit: $—, and besides paid his hotel bills and railroad expenses while on said trips, and besides the defendant paid to the said J. G. Merrimon, Esq., the sum of $500 and other sums as his expenses, to-wit: $500.00 for bringing the said suits and for his services in connection with the cases.

IV. That as to the allegations of paragraph four of said complaint, that while it is true that both parties to said suits appealed to the Supreme Court from the judgment of the Superior Court it is denied that both the plaintiffs in this cause, devoted great time and labor to the preparation of the records, arranging of the transcripts, preparing briefs and arguments in this cause, or devoted great time and labor or that the plaintiff, J. W. Pless, devoted his exclusive time and labor to said work and in the argument in the Supreme Court. It is true, however, that both of said plaintiffs in said appeal assisted in the preparation of records, arranging the transcripts, pre-
15 paring briefs and arguments, and that J. W. Pless, participated in the argument in the Supreme Court, and that said court affirmed the judgment of the lower court, but it is not true that the said J. W. Pless or his co-plaintiff herein, argued said case alone in the Supreme Court, but the principal argument in said court was made by Marshall McCormack, Esq., who was employed to assist in the argument of said cause on behalf of the plaintiff in said case and who made the principal argument therein. It is true that the judgment of the Superior Court was duly confirmed by the judgment of the Supreme Court, but it is not true that the defendant, D. J. McDonald, collected the amount of said judgments prior to the beginning of this action.

V. That it is not true "that by reason of said employment and on account of the labor of the plaintiffs for the said defendant in this cause in the preparation and trial of said causes the defendant, D. J. McDonald, is indebted to the plaintiffs over and above all payments, off sets and counterclaims, and the plaintiffs are entitled to recover of him, the sum of $4,000, with interest from the date of the institution of this suit."

The defendant further answering the said complaint, says

1. That in said case, the principal counsel of the defendant, J. G. Merrimon, Esq., because of the illness of one of his children and his inability to attend the term of the court at which said cause was tried, withdrew from said case and did not appear further in it, and was paid in full $500, besides his expenses as aforesaid, for his services in said cases rendered to that date, and McCormack, Henson & Brown, of Roanoke, Virginia, had charge of said cases from the date of their employment to the completion of the same, and their employment by the defendant commenced on the day the said Merrimon resigned, and the said McCormack, of McCormack, Henson & Brown, had the active charge and control of said cases from that date until the date of its determination, except in so far as the same was managed by the firm of Moore & Rollins, who assisted in preparing

and drawing final judgment and order in said case after the same was decided by the Supreme Court and the defendant paid to the said McCormack, Henson & Brown, the sum of $—, besides the sum of $— on account of expenses in full for their services rendered in said cases; but as alleged by the defendant, the said McCormack, Henson & Brown only charged a small part of this fee as attorneys representing the defendant in his case against MacArthur
16 Brothers Company, and it was the understanding between the plaintiffs and the defendant that when he paid them the $1,000, embraced in said check of $1,000, particularly between the plaintiff, J. W. Pless, and the defendant, that that check was a sufficient amount to pay for all services up to that time.

2. That the defendant became so dissatisfied with the services rendered and the expenses incurred in and about his litigation with MacArthur Brothers Company, and the defendants Meadows Co., the South & Western Railroad Company and the Carolina, Clinchfield & Ohio Railroad Company, in the management of the same by the plaintiffs, that he discharged the said plaintiffs in connection with said case and employed the firm of Moore & Rollins, who, in connection with the said McCormack, of the firm of McCormack, Henson & Brown, managed and controlled thereafter his case until its final conclusion. The said McCormack, Henson & Brown, Moore & Rollins, and the defendant have not yet collected all of said judgment from said defendants, McArthur Brothers Company and the Carolina, Clinchfield & Ohio Railroad Company, but there is still due and owing from them unto the defendant herein the sum of $— on account of said judgment obtained by him against them: nor had there been collected any of said judgment from the defendants therein, prior to or before the bringing of this action by the plaintiffs against the defendant, and the said Moore & Rollins have only been paid the sum of $100, besides some items of expense for their services rendered in said case.

3. That said defendants in said case, said MacArthur Brothers Co., proposed to the defendant in this case, the said D. J. McDonald, to pay to the said D. J. McDonald the sum of $6,915.15 on account of work done by the said D. J. McDonald in Virginia on the road in that State, and the sum of $27,528.00 on account of work done by the defendant, D. J. McDonald, on the road of the Carolina, Clinchfield & Ohio Railroad Company in North Carolina, but the said defendant refused to accept the same and the only matter in dispute between the said plaintiff in said case and the defendant herein was the difference in the price of the work done in Virginia and the work done in North Carolina on the Carolina, Clinchfield & Ohio Railroad at the prices claimed. The defendant contended that the said defendant owed him the difference between the sum of $6,915.15 for work done in Virginia and the difference between the sum of $20,116 and the sum of $— for the work done in North Carolina, and the said defendant won the case in North Carolina and
17 recovered the sum of $27,528 for which the defendant owed the plaintiffs for such recovery.

4. That the plaintiffs are not entitled to recover from the said

D. J. McDonald for anything done by them in this case for that at the time of the bringing of this action he, the said McDonald had not recovered any sum whatever from said MacArthur Brothers Company, Meadows Company, South & Western Railroad Company and the Carolina, Clinchfield & Ohio Railroad Company.

Wherefore, the defendant prays that this case be dismissed at the cost of the plaintiffs, and that the defendant have such other and further relief as he may be entitled to herein.

MOORE & ROLLINS,
Attorneys for the Defendant.

STATE OF ILLINOIS,
County of Cook:

D. J. McDonald, being duly sworn, says that he has heard read the foregoing answer and knows the contents thereof, that the same is true of his own knowledge, except as to such matters as are therein stated upon information and belief, as to which he believes it to be true.

D. J. McDONALD.

Sworn to and subscribed before me this the 18 day of September, 1911.

[SEAL.] SUSAN C. CARNEY,
Notary Public in and for the County of Cook, State of Illinois.

My commission expires Jan. 9, 1912.

Jury Impanelled.

Monday, January 8, 1912.

#285.

J. W. PLESS et al.
vs.
D. J. McDONALD.

The case is called for hearing upon the pleadings joined, and thereupon the following jury of good and lawful men are called, chosen, tried, sworn and empannelled to try the issues joined
18 between the parties, to-wit: S. Flem Thomas, S. M. Reeves, B. Dalton, S. M. Peek, D. W. C. Piercy, J. A. Penland, A. B. Ledford, J. T. Moody, L. D. Gillespie, A. K. Hyder, N. L. Barnard and Lycergus Crymes.

Judgment.

U. S. District Court, Asheville, N. C.

Filed Jan. 15, 1912. J. M. Millikan, Clerk.

In the District Court of the United States for the Western District of North Carolina.

J. W. PLESS and J. W. WINBORNE, Practicing under the Firm Name of Pless & Winborne,
vs.
D. J. MCDONALD.

This cause coming on for hearing at this, the November, 1911, adjourned term, and being heard before his Honor Boyd, judge and jury, and the jury having answered the issue submitted, viz: Is the defendant indebted to the plaintiffs and, if so, in what amount? Answer. Yes. $2,916.00 (twenty-nine hundred and sixteen dollars); with interest from February 2d, 1911.

It is now

Considered, adjudged and decreed upon motion of Locke Craig, counsel for the plaintiffs, that the plaintiffs have and recover judgment against the defendant, D. J. McDonald, in the sum of twenty-nine hundred and sixteen dollars, with interest on the same from the 2d day of February, 1911; and it further appearing to the court from an inspection of the record that the defendant executed an undertaking to dissolve an attachment in said cause, conditioned to pay the plaintiffs all such sums as they might recover in this action, with the United States Fidelity Company as surety, it is now,

Ordered that judgment be and is hereby entered against said surety for said sum of $2,916.00, together with the costs of this action by the plaintiffs in this behalf incurred.

This 13th day of January, 1912.

JAS. E. BOYD,
Judge Presiding.

19 *Bill of Exceptions.*

Filed May 8, 1912. J. M. Millikan, Clerk.

UNITED STATES OF AMERICA,
Western District of North Carolina:

In the United States District Court, at Asheville, Fourth Circuit.

J. W. PLESS and J. W. WINBORNE, Doing Business as Partners under the Name of Pless & Winborne,

vs.

D. J. McDONALD.

Bill of Exceptions.

Be it remembered that on the 8th day of January, 1912, it being the November adjourned term of the District Court of the United States for the Western District of North Carolina, at Asheville, begun and holden in the said City of Asheville, before his Honor, Jas. E. Boyd, District Judge, the above entitled cause came on to be heard and was heard before a jury.

After the jury was impannelled the following proceedings were had:

The plaintiffs in the court below introduced testimony tending to substantiate the allegations of the complainant. The defendant introduced evidence tending to sustain the allegations in the answer. The plaintiff, J. W. Pless, testified in substance on his direct examination that a large portion of his time was consumed in the preparation and trial of the McDonald cases, referred to in the complaint, from the time he was employed on April 15, 1909, until he retires from the cases in January, 1911. On cross examination he was asked the following question:

First Exception.

"Q. Will you kindly state to his Honor and the jury what amount of money you took in for professional services rendered to other than def't from April 15, 1909, the time which you were employed by Mr. McDonald, until January 1, 1911, when you were retired from the case."

The plaintiff below, through his counsel, objected to this question and any answer thereto, and the court sustained the objection
20 on the ground that the testimony would not be relevant to the issue, the sole question being how much defendant owed plaintiff for professional services.

To which said ruling of the court counsel for the defendant then and there duly excepted and hereby tenders this Bill of Exceptions to the court to sign and seal and the court does hereby sign and seal the same.

JAS. E. BOYD, [SEAL.]
U. S. Judge.

After hearing the evidence introduced by the plaintiffs, and the defendant tending to substantiate their respective contentions, and the charge of the court, the jury retired and returned the verdict answering the issue submitted to them as follows:

"Q. What amount, if any, are the plaintiffs entitled to recover of the defendant?

Answer. $2,900.00."

The defendant below, then and there moved the court to set aside the verdict of the jury and based their motion upon the following affidavits:

Affidavit of D. J. McDonald.

In the District Court of the United States for the Western District of North Carolina.

J. W. PLESS and J. W. WINBORNE, Partners, Practicing Law under the Firm Name of Pless & Winborne,

vs.

D. J. MCDONALD.

Affidavit.

D. J. McDonald, the defendant herein, being duly sworn, says: That the jury in this case has returned what purports to be its verdict, finding that the plaintiffs are entitled to recover of the defendant the sum of $2,916, with interest from February 2, 1911; that this *affidavit* is reliably informed and verily believes that the jury arrived at the purported verdict in an illegal, improper and unlawful manner, and that the same is therefore void; that this affiant is reliably informed and verily believes that when the jury retired
21 to the jury room for consideration after having heard the argument of counsel and the charge of the court, it was proposed by one member of the jury, and acquiesced in by the others, that each member of the jury should state what amount he thought the plaintiffs were entitled to recover, and that the aggregate amounts so stated by the twelve jurors should be divided by twelve and the quotient or net result of the division should be the verdict to be returned by the jury in this case; that this agreement was made and entered into by the jury and this improper method was adopted by them in arriving at the purported verdict; that this affiant is reliably informed and verily believes that one of said jurors was in favor of giving the plaintiff, nothing; that two others jurors were in favor of giving the plaintiff $500; that the balance of said jury, with the exception of two, were in favor of different amounts ranging from $1,000 to $4,000; and that two of said jurors were in favor of the plaintiffs recovering the sum of $5,000; that these amounts were used by the jury in arriving at their purported verdict and affiant is informed that one of said jury still has in his possession a paper showing that the alleged verdict was arrived at in this illegal and improper manner, unless said juror has destroyed said paper since yesterday.

That the amount sued for by the plaintiffs in this case is $4,000, and this affiant is informed, and verily believes that the improper method adopted by the jury in arriving at the purported verdict renders the same void, especially so, since two of said jurors, as affiant is informed and believes, set down as their estimate of the amount of damages the plaintiffs were entitled to recover, amounts greater than the amount sued for in the complaint, to-wit: $5,000, and these amounts were used by the jury in arriving at the purported verdict which they returned into court.

This affiant respectfully asks the court to examine, under oath, the members of said jury concerning the question as to the method used by them in arriving at their purported verdict, and such other evidence as the defendant may offer on the subject, and he is informed and verily believes that their evidence will reveal the facts stated in this affidavit.

Wherefore, affiant respectfully prays the Honorable Court to set aside the purported verdict and grant this defendant a new trial.

D. J. McDONALD.

Sworn to and subscribed before me this the 13th day of January, 1912.

M. L. RORISON, *Deputy.*

22 *Affidavit of D. J. McDonald.*

In the District Court of the United States for the Western District of North Carolina.

J. W. PLESS and J. W. WINBOURNE, Partners, Practicing Law under the Firm Name of PLESS & WINBOURNE,

vs.

D. J. McDONALD.

Affidavit.

D. J. McDonald, being duly sworn, in addition to the affidavit heretofore filed in support of his motion to set aside the verdict of the jury, says:

That one of the jurors who tried this case stated to this affiant, since the trial, that when the jury retired to the jury room for the consideration of the case, that the Foreman Dr. Gillespie, proposed to the jury that each juror write down on a piece of paper, the amount he thought the plaintiffs were entitled to recover and that the amounts be added together and then divided by twelve and let the result be the amount the jury should return as their verdict; that the Foreman stated that he had done this in a number of cases wherein he was juror; that this method was fair and thereupon the proposition of the foreman was agreed to by the jury and each juror wrote the amount he thought the plaintiffs were entitled to recover upon a slip of paper and put it in a hat; that thereupon the slips were taken out of the hat and the amounts called out and as the

amounts being called it was observed that three of the jurors had written down the amount of $5,000, as being the amount in their opinion the plaintiff- *was* entitled to recover; that the jury thereupon objected stating that this could not be done, whereupon the jurors who had voted for $5,000 each, or some of them, stated that they and each of them had as much right to vote as much above $4,000, the amount sued for, as the other jurors had to vote for amounts less than the amount sued for; that the various amounts were finally added up and divided by twelve and there was dissatisfaction; that it was at least three quarters of an hour after the calculation had been made before all the jury would consent to stand by the bargain they had made and return the amount figured out, or quotient verdict, as their verdict in this case; that said juror stated to this affiant that he would never — consented to go into the agreement had he known or thought that any of the jury would have put down an amount over $4,000; that after the calculation had been
23 made and the amount found to be so high, there was quite a discussion about the matter and certain jurors who voted in favor of large amounts insisted that the jury should be bound by the agreement and not try to kick out of the proposition.

That another juror had stated since the trial, to two gentlemen of character, that the jury agreed upon the manner of arriving at their verdict in the manner hereinabove stated: that said juror stated that he voted for $5,000, and did all he could for the plaintiffs, and that when the amount was figured out, some of the jurors objected and tried to get out of it, but that he insisted upon the verdict.

That the jurors refuse to file an affidavit in this case but state that they are willing to testify to the facts hereinbefore alleged, provided the court thinks it proper for them to do so.

D. J. McDONALD.

Sworn to and subscribed before me this the 15th day of January, 1912.

M. L. RORISON,
Deputy Clerk.

The court held and ruled that he would hear any evidence the defendant had tending to show that the jury arrived at their verdict in the manner set forth in the above affidavits. The plaintiff in error thereupon called A. K. Hider and three other members of the jury around to the clerk's desk and had them sworn.

A. K. HIDER, after being duly sworn, testified that he was a member of the jury that tried the case of Pless and Winborne against McDonald, and thereupon the counsel for the defendant below asked him the following questions:

Second Exception.

Mr. HIDER: I wish you would state to his Honor, and the jury what was said by the foreman of the jury when the jury retired to their room as to the manner in which they should arrive at their

verdict, and all about the method by which the jury did arrive a their verdict."

Counsel for plaintiff- below objected to the foregoing question and any answer thereto and their objection was sustained.

To which ruling of the court counsel for the defendant then and there duly excepted and hereby tenders this bill of exceptions
24 to the court to sign and seal and the court does hereby sign and seal the same.

The court said:

"You propose to prove that when the jury went to their room to consider their verdict, the Foreman suggested to them that each juror should put down on a piece of paper the amount he thought the plaintiffs ought to have; that that amount then be added up and divided by twelve and that the quotient should be their verdict; they did that, and some of them, as you allege, went above the $4,000, one perhaps for nothing, and that they arrived at their verdict in that way.

Mr. ROLLINS: Yes sir.

Third Exception.

The COURT: I hold that the testimony of a juror is not competent to impeach his verdict. You may have an exception.

UNITED STATES OF AMERICA,
Western District of North Carolina:

District Court, January Term, 1912.

J. W. PLESS and J. W. WINBURN
vs.
D. J. MCDONALD.

Motion and Exception.

After the coming in of the verdict in the above entitled cause, the defendant, D. J. McDonald, came into court, through his attorneys, Martin, Rollins & Wright, and moved the court to set aside the verdict of the jury rendered in this cause for alleged misconduct on the part of the jury in the making up of their verdict herein as set out in the affidavits filed in this cause by the said defendant, D. J. McDonald.

In support of the motion of the said defendant to set aside the verdict herein the defendant caused four of the jurors who sat and acted as jurors in the trial of said cause and who joined in the rendition of the verdict, to be duly sworn and thereupon offered one of said jurors as a witness before the court, and proposed to prove by said juror the facts set forth in the said affidavits of the said D. J. McDonald; and no other testimony or witness except said jurors was offered. The court being of the opinion that the testi-
25 mony of said jurors was incompetent to prove the facts alleged in said affidavits, and thereby impeach their verdicts,

upon objection by counsel for the plaintiffs, excluded said testimony and refused to consider the same. Thereupon the defendants excepted to the ruling of the court in excluding such testimony.

JAS. E. BOYD.

The foregoing exception of the defendants is hereby allowed.

JAS. E. BOYD,
U. S. Judge.

Fourth Exception.

The court refused to set aside the verdict of the jury.

To which said ruling of the court counsel for the defendant below then and there duly excepted and hereby tenders this bill of exceptions to the court to sign and seal and the court does hereby sign and seal the same.

Fifth Exception.

The court thereupon at the instance of the plaintiffs below, and over the objection of the defendant, signed the judgment in favor of the plaintiff- as appears in the record for the sum of $2,916, and costs, and the defendant below again excepted and hereby tenders this bill of exceptions to the court to sign and seal and the court does hereby sign and seal the same.

And in furtherance of justice and that right may be done, the defendant presents the foregoing as his bill of exceptions in this case and prays that the same may be settled and allowed and signed and certified by the judge as provided by law.

MARTIN, ROLLINS & WRIGHT,
Attorneys for Defendant, Plaintiff in Error.

We hereby agree to the foregoing bill of exceptions.
This the 27 day of March, 1912.

LOCKE CRAIG,
Attorney for Plaintiffs, Defendants in Error.
MARTIN, ROLLINS & WRIGHT,
Attorneys for Deft.

26 United States of America, Western District of North Carolina, District Court, January Term, 1912.

J. W. PLESS and J. W. WINBURN
v.
D. J. MCDONAL.

Order.

In the above entitled cause, it is ordered by the court, by consent of counsel for the plaintiffs and counsel for the defendant, that the defendant be and *they* are hereby allowed thirty days from the adjournment of the present term of this court in which to prepare and serve *their* bill of exceptions in this case, and the plaintiffs are

allowed fifteen days thereafter in which to prepare and serve their objections to such bill, and the court fixes the bond for costs on appeal in the sum of $300, and the supersedeas bond in the sum of $4,000 to be justified and approved by the clerk of this court.

JAS. E. BOYD,
U. S. District Judge.

Order Approving and Settling Bill of Exceptions.

Filed May 8, 1912, J. M. Millikan, Clerk.

United States of America, Western District of North Carolina, District Court, Fourth Circuit at Asheville.

PLESS & WINBORNE
vs.
D. J. MCDONALD.

Order.

It appearing to the court that the plaintiffs and defendant have agreed upon the foregoing bill of exceptions, it is now, upon motion of Martin, Rollins & Wright, attorneys for defendant, ordered and adjudged that the foregoing bill of exceptions be and the same is hereby approved, settled and allowed as the bill of exceptions in this case.

JAS. E. BOYD, *U. S. Judge.*

27 The bond for costs on this case is fixed at ($300) three hundred dollars, if given for costs only, but if for supersedeas also, then the bond is fixed at the sum of four thousand ($4,000.00) dollars, to be approved by the court.

JAS. E. BOYD, *U. S. Judge.*

May 8, 1912.

Assignment of Errors.

U. S. District Court, filed Jun- 27, 1912, J. M. Millikan, Clerk.

In the District Court of the United States for the Western District of North Carolina, Fourth Circuit, at Asheville.

At Law.

J. W. PLESS and J. W. WINBOURNE, Partners, Practicing Law under the Firm Name of Pless & Winbourne,
vs.
D. J. MCDONALD and THE UNITED STATES FIDELITY AND GUARANTY COMPANY.

Assignment of Errors.

The defendant, D. J. McDonald, and the United States Fidelity and Guaranty Company, surety on the bond of the defendant, filed

in order to dissolve the attachment, file the following assignment of errors, upon which they will rely upon their appeal from the judgment and decree of the District Court of the United States for the Western District of North Carolina, made and entered in this cause on the 13th day of January, 1912, it being the November, 1911, adjourned term of said court, to the Circuit Court of Appeals for the Fourth Circuit, to-wit:

I.

That said District Court erred in sustaining the plaintiff's objection to the following question propounded to the plaintiff, J. W. Pless, on cross-examination: "Q. Will you kindly state to his Honor and the jury what amount of money you took in from professional services rendered to others than the defendant from April 15, 1909, the time when you were employed by Mr. McDonald, until January 1, 1911, when you were retired from the case," said assignment of error being the basis of the defendant's first exception in the bill of exceptions filed in this cause.

II.

The court erred in refusing to permit the juror, A. K. Hyder, to answer the following question in regard to the method adopted by the jury in arriving at their verdict: "Q. Mr. Hyder, I wish you would state to his Honor and the jury what was said by the foreman of the jury when the jury retired to their room as to the manner in which they should arrive at their verdict, and all about the method by which the jury did arrive at their verdict." The plaintiffs in the trial below objected to the foregoing question and any answer thereto. The court, addressing counsel for defendant, said: "You propose to prove that when the jury went to their room to consider their verdict, the foreman suggested to them that each juror should put down on a piece of paper the amount he thought the plaintiffs ought to have; that that amount then be added up and divided by twelve, and that the quotient should be their verdict; they did that, and some of them as you allege went above the $4,000; one perhaps for nothing, and that they arrived at their verdict in that way." Upon being informed by counsel for defendant that this was what they proposed to prove, the court held and ruled that the testimony of the juror was incompetent and the court then and there sustained the plaintiffs' objection to the question, and the defendant then and there excepted and the exception was signed, sealed and allowed by the court.

III.

That the court erred in holding and ruling that the testimony of a juror is not competent to impeach his verdict.

IV.

That the court erred in refusing to set aside the verdict of the jury.

V.

The court erred in signing the judgment in favor of the plaintiffs and against the defendant, D. J. McDonald, and the United States Fidelity and Guaranty Company, the surety upon the bond filed by the defendant in this cause to dissolve the attachment.

29 Wherefore, the defendant, D. J. McDonald, and the United States Fidelity and Guaranty Company, pray that the judgment of the said court be reversed.

MARTIN, ROLLINS & WRIGHT,
Attorneys for D. J. McDonald, Defendant, and United States Fidelity and Guaranty Company.

Stipulation in re Transcript.

U. S. District Court, Fil. Jul. 22, 1912, J. M. Millikan, Clerk.

In the District Court of the United States for the Western District of North Carolina.

J. W. PLESS and J. W. WINBOURNE, Partners, Practicing Law under the Firm Name of Pless & Winbourne,
versus
D. J. McDONALD and UNITED STATES FIDELITY AND GUARANTY COMPANY.

It is hereby stipulated and agreed that the clerk of this court shall make up a transcript of the record in the above styled cause, transmit the same to the Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, at Richmond, Va., and be printed, in accordance with Rule 23 of that court.

LOCKE CRAIG,
Counsel for Plaintiffs, Defendant in Error.
MARTIN, ROLLINS & WRIGHT,
Counsel for Defendants, Plaintiff in Error.

Jul. 22, 1912.
Petition for writ of error, filed Jun. 27, 1912.
Order allowing writ of error, filed Jun. 27, 1912.
Writ of error, issued Jun. 26, 1912. Filed Jun. 27, 1912.
Appeal bond, dated Aug. 10, 1912. Penalty $300.00, obligors American Surety Company of New York, conditioned for costs.
Citation, dated Jun. 26, 1912, service accepted Jun. 27, 1912.

30 In the United States District Court for the Western District of North Carolina, at Ashville.

I, J. M. Millikan, Clerk of the United States District Court for the Western District of North Carolina, do hereby certify that the foregoing is a true, full and complete transcript of the record and

proceedings in the case of: J. W. Pless and J. W. Winbourne, under the firm name of Pless & Winborne vs. D. J. McDonald, and the United States Fidelity & Guaranty Company as fully as the same remains on file and of record in my office.

In testimony whereof, I hereunto set my hand and affix the seal of said court, at office in the City of Asheville, N. C., this August 12, 1912.

[Seal of Court.]

J. M. MILLIKAN,
Clerk U. S. District Court, at Asheville, N. C.,
By W. S. HYAMS,
Deputy Clerk.

31 *Proceedings in the United States Circuit Court of Appeals for the Fourth Circuit.*

No. 1125.

D. J. McDONALD and THE UNITED STATES FIDELITY AND GUARANTY COMPANY, Plaintiffs in Error,
versus
J. W. PLESS and J. W. WINBOURNE, Partners, Practicing Law under the Firm Name of Pless & Winbourne, Defendants in Error.

In Error to the District Court of the United States for the Western District of North Carolina, at Asheville.

August 14, 1912, transcript of record is filed, and cause docketed.

Same day, original petition for writ of error, order allowing writ of error, writ of error, bond and citation certified up to this court in pursuance of Sec. 7 of Rule 14.

Same day, order of July 22, 1912, extending the time to Aug. 23, 1912, to file transcript — record in this court filed.

Same day, appearance of Martin, Rollins & Wright for the plaintiffs in error is entered.

Aug. 19, 1912, appearance of A. Hall Johnston and Locke Craig for the defendants in error is entered.

Oct. 12, 1912, twenty-five copies of the printed record are filed.

Oct. 21, 1912, stipulation of attorneys extending the time for the filing of briefs filed.

Dec. 9, 1912, (November term, 1912,) cause came on to be heard before Pritchard, Circuit Judge, and Waddill and Rose, District Judges, and is argued by counsel and submitted.

32 June 9, 1913, (May term, 1913,) the court announced and filed its opinion, which is as follows, to-wit:

Opinion.

Filed June 9, 1913.

33 United States Circuit Court of Appeals, Fourth Circuit.

No. 1125.

D. J. McDonald and The United States Fidelity & Guaranty Co., Plaintiffs in Error,
versus
J. W. Pless and J. W. Winbourne, Partners, Practicing Law under the Firm Name of Pless & Winbourne, Defendants in Error.

In Error to the District Court of the United States for the Western District of North Carolina, at Asheville.

[Argued December 9, 1912. Decided June 9, 1913.]

Before Pritchard, Circuit Judge, and Waddill and Rose, District Judges.

Thomas Rollins, (Martin Rollins & Wright on brief), for plaintiffs in error, and A. Hall Johnson, (Locke Craig on brief) for defendants in error.

This is a writ of error sued out to a judgment of the United States District Court for the Western District of North Carolina, at Asheville, rendered in favor of the defendants in error, against the plaintiffs in error, on the 13th day of January, 1912.

34 The facts in the case, briefly stated, are as follows: The defendants in error, plaintiffs in the court below, instituted their action at law in the Superior Court of McDowell County, North Carolina, to recover from the plaintiffs in error, defendants in the court below, an alleged indebtedness of $4,000.00. The suit was by appropriate proceedings, removed to the United States District Court for the Western District of North Carolina, where the defendants by proper plea denied liability for the claim as a whole, and upon issue joined, the same was submitted to a jury, who rendered a verdict in favor of the plaintiffs for $2,916.00, with interest. This verdict the defendants, plaintiffs in error here, sought to set aside, because of alleged misconduct of the jury in rendering the same, and in support of their motion, filed two affidavits of the defendant, D. J. McDonald, setting forth in substance that after the jury retired to consider of their verdict, it was proposed by one of the jurors, and acquiesced in by the others, that each member of the jury would state what amount the thought the plaintiffs were entitled to recover, and that the aggregate sum arrived at should be divided by twelve, and the quotient or net result of the division should be the verdict returned by the jury; that the agreement was made and entered into, and the jurors in pursuance thereof, named different amounts, ranging from $500.00 to $4,000.00; that one of the jurors

was for nothing, and two for $5,000.00 each. That the verdict thus arrived at was by a division of the total of the sums stated by each juror. The plaintiff in error, D. J. McDonald, stated these facts in these affidavits, and that he could prove the same, and also that there was in existence, and in the possession of one of the jurors, a paper showing how the verdict was arrived it. The trial court ruled that it would hear evidence to show that the jury arrived at their verdict in the manner set forth in the affidavits; whereupon counsel for the plaintiffs in error called A. K. Hider, one of the jurors, and three other members of the jury, to the clerk's desk, and had them sworn, and propounded to Juror Hider the following question: "Q. Mr. Hider, I wish you would state to his honor and the jury
35 what was said by the foreman of the jury when the jury retired to their room, as to the manner in which they should arrive at their verdict, and all about the method by which the jury did arrive at their verdict." To this question counsel for defendants in error excepted, and the exception was sustained. Thereupon, the following occurred. The court said: "You propose to prove that when the jury went to their room to consider their verdict, the foreman suggested to them that each juror should put down on a piece of paper the amount he thought the plaintiffs ought to have; that that amount then be added up and divided by twelve and that the quotient should be their verdict; they did that, and some of them, as you allege, went above $4,000.00, one perhaps for nothing, and that they arrived at their verdict in that way.

"Mr. ROLLINS: Yes, sir.

"The COURT: I hold that *that* the testimony of a juror is not competent to impeach his verdict. You may have an exception."

To this ruling and action of the court, the defendants below excepted, and duly preserved their bill of exception, which, among other things, recited that no other testimony or witness than said juror was offered; and the court being of opinion that the testimony of the juror was incompetent to prove the facts alleged in said affidavits, and thereby impeach their verdict, upon objection by counsel for plaintiff below, excluded said testimony, and refused to consider the same. Thereupon judgment was duly entered on the verdict in favor of the plaintiff, to which action and judgment of the court in excluding the testimony aforesaid, and in entering judgment on the verdict, this writ of error was sued out, and the plaintiffs in error in their second assignment, fully sets forth their objection to the ruling of the court, rejecting the testimony of the juror, which is the only assignment relied on in the appellate court for the reversal of the action of the court below.

36 WADDILL, *District Judge* (after stating the facts as above):

The facts of the case briefly stated, and the one error insisted upon of those embraced in the assignments, present but a single issue for the determination of the court; that is to say, whether a juror may be called to impeach a verdict found by a jury of which he was a member, respecting a matter inherent in the verdict itself.

In the view of this court, but little need be said regarding this

assignment, as the same is clearly without merit, certainly under the decisions of the federal courts, and of the courts of most of the states of the Union. The courts of but few states take the view that jurors can be called for the purpose of assailing their verdicts, or enquiring into the methods and purposes that actuated the jurors in arriving at their conclusions, or the manner whereby they arrived at the amount awarded by the verdict

Under decisions of the State of Tennessee, and perhaps those of other states, the enquiry attempted here might be made; but it is almost the uniform rule, especially where the subject of investigation relates to a matter that inheres within the verdict itself, that a juror will not be heard orally, or by affidavit or otherwise, to impeach the verdict, or in any way disturb the result arrived at by himself and his fellows; that such practice is forbidden by public policy, and would bring about unseemly squabbles and contentions, and quickly result in the overthrow of the jury system.

The federal decisions sustain this view without variation, unless it be perhaps in one or two cases following the state practice in a state where the exceptional doctrine, as in Tennessee, prevails.

The Supreme Court of the United States has emphasized the doctrine in the recent decision of Hyde v. United States, 225 U. S., 347, 381, 384; and to the same effect will be found the following federal authorities (and others might be cited): Maddox v. United States, 146 U. S., 140, 148; United States v. Dunbar, 17 Fed., 808; Chandler v. Thompson, 30 Fed., 38, and cases cited. In the
37 last named decision, an opinion of Judge Dick of the western district of North Carolina, from which jurisdiction the present case came, it is said: "It was an old rule, and well settled, that on motion for a new trial, a juror would not be allowed to explain the grounds of their verdict." In Glasspell v. Northern Pacific R. R., 43 Fed., 909, it is said that, "Upon grounds if public policy, the counts have almost universally agreed upon the rule, that no affidavit, deposition, or sworn statement of a juror shall be received to impeach the verdict, or to explain it, or to show upon what grounds it was rendered." In Pelzer Manf'g Co. v. Hamburg-Bremen Fire Insurance Co., 71 Fed., 826. Judge Simonton, of this circuit, said: "None of the cases permit a juror to impeach a verdict because of his own misconduct, or that of other jurors in the jury room, or to divulge the motives or method by which they reached their verdict." Also Callahan v. Chicago, M. & St. P. R. R., 158 Fed., 994.

The State decisions, and none more so than those of the State of North Carolina, strongly adhere to the view herein announced, and the same may be said of the leading text writers on the subject. State v. Smallwood, 78 N. C., 561, 562; State v. Brittain, 89 N. C., 481, 504; Lafoon v. Shearin, 95 N. C., 391, 394; State v. Best, 111 N. C., 638, 642; Gordon v. Commonwealth, 100 Va., 825, 834; Hauk v. Allen, 11 L. R. A., (Indiana) 706; Murphy v. Murphy, 9 L. R. A., 820, 822, (So. Dakota); and cases cited; Goodman v. Cody, 1 Wash. Ter., 329, 34 Am. Rep., 808; Thom & Mer. on Juries, Sections 364-6; Ency. of Evidence, vol. 8, page 964, 968; 14 Ency.

Plead. & Prac., 905, 906, 911 (where cases from nearly every state in the Union are cited); Thompson's Trials, vol. 2, page 1963.

It follows from what has been said, that there is no error in the action of the lower court, and the same will be affirmed.

Affirmed.

38 & 39 June 10, 1913, (same term), the court made and entered the following judgment, to-wit:

Judgment.

Filed and Entered June 10, 1913.

United States Circuit Court of Appeals, Fourth Circuit.

No. 1125.

D. J. McDonald and The United States Fidelity and Guaranty Company, Plaintiffs in Error,

vs.

J. W. Pless and J. W. Winbourne, Partners, Practicing Law under the Firm Name of Pless & Winbourne, Defendants in Error.

In error to the District Court of the United States for the Western District of North Carolina.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of North Carolina, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said District Court, in this cause, be, and the same is hereby affirmed, with costs.

J. C. PRITCHARD.

June 10, 1913.

July 11, 1913, the mandate of this court in this cause is issued and transmitted to the said District Court of the United States for the Western District of North Carolina, at Asheville, in due form.

Same day, the original petition for writ of error, order allowing writ of error and bond certified up to this court, in pursuance of Sec. 7, Rule 14, are returned to the Clerk of the said District Court, at Asheville, N. C.

40 *Clerk's Certificate.*

United States of America,
Fourth Circuit ss:

I, Henry T. Meloney, Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, do certify that the foregoing is a true copy of the entire record and proceedings in the therein entitled

cause as the same remains upon the records and files of the said Circuit Court of Appeals.

In testimony whereof I hereto set my hand and affix the seal of the said United States Circuit Court of Appeals for the Fourth Circuit, at Richmond, this 10th day of October, A. D., 1913.

[Seal United States Circuit Court of Appeals, Fourth Circuit.]

HENRY T. MELONEY,
Clerk U. S. Circuit Court of Appeals, Fourth Circuit.

41 United States Circuit Court of Appeals, Fourth Circuit.

UNITED STATES OF AMERICA:

I, Henry T. Meloney, Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, do make return of the annexed writ of certiorari issued out of the Supreme Court of the United States in the cause therein entitled on the 29th day of October, 1913, by annexing hereto a certified copy of the stipulation of the attorneys of record, that the transcript already filed in the Clerk's office in the Supreme Court of the United States on the petition for the writ of certiorari be taken as a return of said writ.

In testimony whereof I hereto set my hand and affix the seal of the said Circuit Court of Appeals, at Richmond, on this seventh day of November, A. D., 1913.

[Seal United States Circuit Court of Appeals, Fourth Circuit.]

HENRY T. MELONEY,
Clerk U. S. Circuit Court of Appeals, Fourth Circuit.

42 In the United States Circuit Court of Appeals, Fourth Circuit.

No. 1125.

D. J. McDONALD and UNITED STATES FIDELITY AND GUARANTY COMPANY, Plaintiffs in Error,

vs.

J. W. PLESS and J. W. WINBOURNE, Partners, Trading under the Firm Name of PLESS & WINBOURNE, Defendants in Error.

It is hereby stipulated that the transcript already filed in the Clerk's office in the Supreme Court of the United States on the petition for the writ of certiorari be taken as a return of said writ. This the 1st day of November, 1913.

MARTIN, ROLLINS & WRIGHT,
Counsel for Plaintiffs in Error.
A. HALL JOHNSTON,
Counsel for Defendants in Error.

I, Henry T. Meloney, Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, do certify that the foregoing is a true copy of the original stipulation filed and entered among the proceedings of the said Court in the therein entitled cause.

In testimony whereof I hereto set my hand and affix the seal of the said Circuit Court of Appeals, at Richmond, on this seventh day of November, A. D., 1913.

[Seal United States Circuit Court of Appeals, Fourth Circuit.]

HENRY T. MELONEY,
Clerk U. S. Circuit Court of Appeals,
Fourth Circuit.

43 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Fourth Circuit, Greeting:

Being informed that there is now pending before you a suit in which D. J. McDonald and The United States Fidelity & Guaranty Company are plaintiffs in error, and J. W. Pless and J. W. Winbourne, partners, practicing law under the firm name of Pless & Winbourne, are defendants in error, which suit was removed into the said Circuit Court of Appeals by virtue of a writ of error to the District Court of the United States for the Western District of North Carolina, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the
44 Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 29th day of October, in the year of our Lord one thousand nine hundred and thirteen.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

45 [Endorsed:] File No. 23,912. Supreme Court of the United States, October Term, 1913. No. 761. J. W. McDonald et al. vs. J. W. Pless et al., etc. Writ of Certiorari. The Execution of the within writ appears from the schedules thereunto annexed. Henry T. Meloney, Cl'k U. S. Cir. Court of Appeals.

46 [Endorsed:] File No. 23,912. Supreme Court U. S., October Term, 1914. Term No. 283. D. J. McDonald et al., Petitioners, vs. J. W. Pless & J. W. Winbourne, etc. Writ of Certiorari and return. Filed Nov. 8th, 1913.

No. 288.

IN THE

Supreme Court of the United States,

October Term, 1913.

D. J. McDonald and the United States Fidelity and Guaranty Company, Petitioners,

vs.

J. W. Pless and J. W. Winbourne, Partners, Practicing Law under the firm name of Pless & Winbourne, Respondents.

Petition and Motion for Certiorari.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1913.

D. J. McDONALD AND THE UNITED STATES FIDELITY AND GUARANTY COMPANY,
PETITIONERS,

v.

J. W. PLESS AND J. W. WINBOURNE, PARTNERS PRACTICING LAW UNDER THE FIRM NAME OF PLESS & WINBOURNE, RESPONDENTS.

ON MOTION FOR CERTIORARI.

NOTICE.

To J. W. Pless and J. W. Winbourne, Respondents:—

You and each of you are hereby notified that the petitioners, D. J. McDonald and The United States Fidelity and Guaranty Company, will on Monday, the 20th day of October, 1913, upon their verified petition and copy of the entire record in this cause, at the opening of the court on that day, or as soon thereafter as counsel can be heard, submit a motion (a copy of which and of the petition for writ of certiorari and brief in support thereof are herewith delivered to you), to the Supreme Court of the United States, in its court room at the Capitol, in the City of Washington, District of Columbia.

This the 15th day of October, 1913.

JULIUS C. MARTIN,
THOMAS S. ROLLINS,
GEORGE H. WRIGHT,
Attorneys for Petitioner.

The foregoing notice is hereby accepted as if in due time and delivery of a copy thereof and of the petition for writ of certiorari and brief in support of the petition referred to, are hereby acknowledged. This October 17th, 1913. A Hall Johnston ~~J. W. PLESS and J. W. WINBOURNE.~~

Attorneys for Respondents.

IN THE SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1913.

D. J. McDONALD AND THE UNITED STATES FIDELITY AND GUARANTY COMPANY,
PETITIONERS,

v.

J. W. PLESS AND J. W. WINBOURNE, PARTNERS PRACTICING LAW UNDER THE FIRM NAME OF PLESS & WINBOURNE, RESPONDENTS.

Now comes D. J. McDonald and the United States Fidelity and Guaranty Company, by Geo. H. Wright, counsel, and move this Honorable Court that it shall, by certiorari or other proper process directed to the Honorable, the Judges of the United States Circuit Court of Appeals for the Fourth Circuit, require said Court to certify to this Court for its review and determination a certain cause in said Court of Appeals lately pending, wherein the petitioners D. J. McDonald and The United States Fidelity and Guaranty Company were plaintiffs in error, and the respondents, J. W. Pless and J. W. Winbourne, partners practicing law under the firm name of Pless & Winbourne, were defendants in error; and to that end they tender herewith their petition and brief with a certified copy of the entire record of said cause in said Circuit Court of Appeals.

This 15th day of October, 1913.

GEORGE H. WRIGHT,
Counsel for Petitioners.

IN THE SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1913.

D. J. McDONALD AND THE UNITED STATES FIDELITY AND GUARANTY COMPANY,
PETITIONERS,

v.

J. W. PLESS AND J. W. WINBOURNE, PARTNERS PRACTICING LAW UNDER THE FIRM NAME OF PLESS & WINBOURNE, RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:—

Your petitioners, D. J. McDonald and The United States Fidelity and Guaranty Company, respectfully represent to this Honorable Court:

That it seems to your petitioners that a writ of certiorari ought to issue in this cause for a review thereof by this Honorable Court, upon the following grounds:

First. In the interests of jurisprudence and uniformity of decisions between this Honorable Court and the said Circuit Court of Appeals, there being, as your petitioners are advised and believe, a substantial conflict of decisions between the said Circuit Court of Appeals and this Honorable Court on a vital and controlling matter in said cause.

Second. Because, as your petitioners are advised and believe, the question involved in this cause is of such general importance as effecting the uniformity of decisions between the several Circuit Courts of Appeal as to demand the exercise of the power of this Court to review the same.

And in this behalf your petitioners further show to this Honorable Court:

I.

That your petitioner, D. J. McDonald, was at the commencement of this action, and now is, a citizen and resident of the State of Illinois, and that the respondents, J. W. Pless and J. W. Winbourne, were at the commencement of this action, and now are, citizens and residents of the State of North Carolina.

II.

That this action was begun by the said respondents against said petitioner D. J. McDonald on the 2nd day of February, 1911, in the Superior Court of McDowell County, North Carolina, for the recovery of a sum alleged to be due by contract in excess of Two Thousand Dollars; that in said action a writ of attachment was issued and levied upon property belonging to the petitioner D. J. Mc Donald, and in order to discharge said property from said attachment the said petitioner D. J. McDonald filed a bond in said cause with the petitioner United States Fidelity and Guaranty Company as surety thereon; that subsequently, on the petition of the said D. J. McDonald, the said cause was removed for trial from the said Superior Court of McDowell County, North Carolina, in the United States Circuit Court for the Western District of North Carolina; that said cause was thereafter, on the 8th day of January, 1912, tried in the District Court of United States for the Western District of North Carolina, and resulted in the judgment in favor of the said respondents hereto and against your petitioners, in the sum of $2,916.00; that subsequently your petitioners duly sued out a writ of error to review said judgment in the Court of Appeals for the Fourth Circuit; that said judgment was reviewed on said writ of error in the Court of Appeals for the Fourth Circuit, and at the.....Term of said Court the judgment of the District Court was duly affirmed by the said Circuit Court of Appeals.

III.

That at the trial of said action in the District Court and after the verdict had been rendered in said cause, the respondents duly moved the Court to set aside the verdict of the jury upon the ground that the jury had arrived at

its verdict by chance or lot, and offered to the Court the affidavit of the respondent D. J. McDonald, as set out on pages 20 to 23 of the record, in support of said motion. The Court then ruled that it would hear any evidence the defendant offered tending to show that the jury had arrived at their verdict in the manner set forth in said affidavit, and thereupon the respondents offered one A. K. Hyder (see record, pages 23 and 24), who, after being duly sworn, was questioned as follows:

"Mr. Hyder, I wish you would state to his Honor and the jury, what was said by the foreman of the jury when the jury retired to their room as to the manner of which they should arrive at their verdict, and all about the method by which the jury did arrive at their verdict."

"Counsel for plaintiff below objected to the foregoing question and any answer thereto and their objection was sustained.

"To which ruling of the court counsel for the defendant then and there duly excepted and hereby tenders this bill of exceptions to the court to sign and seal and the court does hereby sign and seal the same.

"The court said:

" 'You propose to prove that when the jury went to their room to consider their verdict, the foreman suggested to them that each juror should put down on a piece of paper the amount he thought the plaintiffs ought to have; that that amount then be added up and divided by twelve and that the quotient should be their verdict; they did that, and some of them, as you allege, went above the $4,000, one perhaps for nothing, and that they arrived at their verdict in that way.' "

Counsel for petitioners answered:

"Yes, sir."

The Court: "I hold that the testimony of a juror is not competent to impeach his verdict. You may have an exception."

The petitioner, D. J. McDonald, duly excepted to said ruling of the court and to the judgment of the court entered on said verdict. (See record, page 24). Thereupon the motion and exception was put in writing as follows:

"After the coming in of the verdict in the above entitled cause, the defendant, D. J. McDonald, came into court, through his attorneys, Martin, Rollins & Wright, and moved the court to set aside the verdict of the jury rendered in this cause for alleged misconduct on the part of the jury in the making up of their verdict herein as set out in the affidavits filed in this cause by the said defendant, D. J. McDonald.

"In support of the motion of the said defendant to set aside the verdict herein the defendant caused four of the jurors who sat and acted as jurors in the trial of said cause and who joined in the rendition of the verdict, to be duly sworn and thereupon offered one of said jurors as a witness before the court, and proposed to prove by said juror the facts set forth in the said affidavits of said D. J. McDonald; and no other testimony or witness except said jurors was offered. The court being of the opinion that the testimony of said jurors was incompetent to prove the facts alleged in said affidavits, and thereby impeach their verdicts, upon objection by counsel for the plaintiffs, excluded said testimony and refused to consider the same. Thereupon the defendants excepted to the ruling of the court in excluding such testimony.

"JAS. E. BOYD.

"The foregoing exception of the defendants is hereby allowed.

"JAS. E. BOYD,
"U. S. Judge."

The said Circuit Court of Appeals upon said writ of error held that the testimony of said juror offered by the respondent in the District Court to show that the verdict in this case was rendered by chance, or lot, and was what is sometimes called a "quotient verdict," was incompetent, and thereupon affirmed the judgment of the District Court. A copy of the opinion of said Circuit Court of Appeals is set out in this cause, pages 33 to 37.

IV.

The petitioners here insist that the said judgment of the District Court and the said judgment of the Circuit Court of Appeals affirming said judgment of the District

Court were erroneous and contrary to law in the following particulars:

First. That a verdict rendered by chance or lot, as was the verdict in this case, as set out in the affidavits filed in the record, is void and should be set aside.

Second. That the testimony of individual jurors who participated in making up the verdict by chance, or lot, is competent to prove that such verdict was so found and returned.

Third. That upon the affidavits of the petitioner D. J. McDonald, set out in the record, the District Court should have found the facts and have ruled on the question as to whether or not said verdict was unlawful and void.

The authorities upon which the petitioners rely are set out in full in their brief filed herewith.

Your petitioners believe that the aforesaid judgment of the Circuit Court of Appeals is erroneous, and that this Honorable Court should require the said case to be certified to it for its review and determination, in conformity with the provisions of the Act of Congress in such cases made and provided.

Wherefore, your petitioners respectfully pray that a writ of certiorari may be issued out of and under the seal of this court, directed to the United States Circuit Court of Appeals for the fourth circuit, commanding the said court to certify and send to this court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals in the said case therein, entitled, "D. J. McDonald and The United States Fidelity and Guaranty Company v. J. W. Pless and J. W. Winbourne, partners practicing law under the firm name of Pless & Winbourne, No. 1125," to the end that said case may be reviewed and determined by this court as provided in Sec. 6 of the Act of Congress entitled, "An Act to Establish Circuit Court of Appeals, and to Define and Regulate in Certain Cases the Jurisdiction of the Courts of the United States, and for Other Purposes," approved March 3, 1891; or that your petitioners may have such

other or further relief or remedy in the premises as to this Court may seem appropriate and in conformity with the said Act, and that the said judgment of the said Circuit Court of Appeals in the said case, and every part thereof, may be reversed by this Honorable Court.

And your petitioners will ever pray.

JULIUS C. MARTIN,
THOS. S. ROLLINS,
GEO. H. WRIGHT.

State of North Carolina—County of Buncombe.

George H. Wright, being duly sworn, says that he is one of the counsel for D. J. McDonald and The United States Fidelity and Guaranty Company, the petitioners; that he prepared the foregoing petition and that the allegations thereof are true as he verily believes.

GEORGE H. WRIGHT.

Subscribed and sworn to before me by George H. Wright, this the 15 day of October, A. D., 1913.

J. FRAZIER GLENN,
Notary Public of Buncombe County,
North Carolina.

My commission expires June 14, 1915.

17

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. [redacted].283

D. J. McDONALD AND THE UNITED STATES FIDELITY AND GUARANTY COMPANY, PETITIONERS,

vs.

J. W. PLESS AND J. W. WINBOURNE, PARTNERS, PRACTICING LAW UNDER THE FIRM NAME OF PLESS & WINBOURNE, RESPONDENTS.

BRIEF FOR RESPONDENTS.

E. J. JUSTICE,
A. HALL JOHNSTON,
Counsel for Respondents.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 761.

D. J. McDONALD AND THE UNITED STATES FIDELITY AND GUARANTY COMPANY, PETITIONERS,

vs.

J. W. PLESS AND J. W. WINBOURNE, PARTNERS, PRACTICING LAW UNDER THE FIRM NAME OF PLESS & WINBOURNE, RESPONDENTS.

BRIEF FOR RESPONDENTS.

It is respectfully submitted that there is no ground whatever for the petitioners' position. It is true that Wigmore on Evidence, cited by petitioners, has taken a position on the proposition involved in this case that cannot be sustained by reason, and is certainly contrary to what is shown by the decisions from practically all of the States in the Union except where, by reason of statute, they have a different practice. One or two States—to wit, Tennessee and others—have a statute which permits such investigation. On that ground, such courts have permitted the State practice to prevail in the Federal court, and have permitted juries to testify, but in all of the Federal courts it has been put upon the

ground of the practice prevailing in the State. We are respectfully insisting that the State practice controls, and this being true—and North Carolina, where this case was tried, having directly passed upon it a great many of times, as shown by the opinion of Appellate Judge Waddill and in the cases cited in the brief filed in that court—the attorneys who earned this fee should not longer be kept out of their money. In State *vs.* Britton, 98 N. C., 481, which cites Thom. & Mer. on Juries, section 346, and State *vs.* Smallwood, 78 N. C., 560, and State *vs.* Royal, 97 N. C., 755, this matter is settled in North Carolina. A complete brief will be found in the Enc. of Evidence, vol. 8, beginning with page 964; also Enc. P. & P., vol. 14, 905, the matter is fully treated and our position is sustained; also see Thompson's Trials, vol. 2, page 1963. Pelzer Mfg. Co. *vs.* Hamburg-Bremen Fire Insurance Company, 71 Fed. Rep., 826. We think this case is conclusive of the subject by reason of the full citation of authorities and the reason sustaining it.

We respectfully ask permission to append the printed copy of brief filed in the Circuit Court of Appeals relating to this exception.

Respectfully submitted,

E. J. JUSTICE,
Of Greensboro, N. C.,
A. HALL JOHNSTON,
Of Marion, N. C.,
For Respondents.

APPENDIX.

Brief for Defendants in Error.

* * * * * * *

Second and Third Exceptions. These exceptions are to the refusal of his honor, the judge below, to permit jurors to attack their verdict by their own evidence. We respectfully submit that these exceptions cannot be sustained.

There are a few States which have statutes which permit this to be done, but those statutes are plainly in derogation of the common law, and only in those States, with very few exceptions, does this practice prevail. Practically all of the courts of the Union have passed upon this, and have refused to allow jurors directly, or witnesses getting information from jurors, to attack the verdict of the jury. This matter is so thoroughly treated by the writers in a number of standard law publications universally used that we think the citation of these publications shows that this question is thoroughly and forever settled.

We will first show, however, that the practice in North Carolina, permitting jurors to attack their verdict, does not prevail.

In *State vs. Britton*, 98 N. C., 481, which was a criminal case where the defendant had been convicted for a homicide, the Supreme Court stated on page 508, "It is well settled that a juror cannot be examined as a witness to impeach the verdict of the jury of which he was a member." The court here cites Thom. & Mer. on Juries, sections 364-6, and *State vs. Smallwood*, 78 N. C., 560. In the Smallwood case the defendant was convicted of murder. The Supreme Court in that case, at page 536, says, "This conduct on the part of the jury to impeach their verdict must be shown by other testimony than their own. This has been long settled and for the most convincing reasons, which will readily suggest themselves to all minds at all familiar with the administra-

tions of justice through the medium of trial by jury." The court there cites *State vs. McLeod,* 1st Hawes (8th N. C.), 344. To the same effect is *State vs. Royal* (90 N. C., 755), in which the court states "There is no principle of law better settled in this State than that evidence impeaching their verdict must not come from the jury, but must be shown by other testimony."

This is also the practice in Virginia, and thoroughly settled there (*Gordon vs. Commonwealth,* 57 L. R. A., 744). The same is true in Indiana (*Hauk vs. Allen,* 11 L. R. A., at page 703). In a note to this case it is stated that the only exceptions to this rule are those in which the legislature has by express enactment authorized such attack upon the verdict by those rendering it, citing *Murphy vs. Murphy,* 9 L. R. A., 820. The notes to the Murphy case are full and cite many cases to the same effect. These notes show that affidavits of jurors, and the testimony of jurors should be excluded, and this is the practice in the courts of all the States cited in these notes. In the Murphy case the affidavit or evidence of the juror was not permitted, although the complainant was seeking to establish that a clerical error had been made in writing the verdict.

A complete brief on this subject is shown in the Enc. of Evidence, vol. 8, beginning with page 964. It is stated on that page "In general the affidavit of a juror is not admissible to impeach the verdict, nor can he give oral testimony which will have that effect." To sustain this the decision from practically all the courts in the Union are shown.

The same rule applies to chance or quotient verdicts. Same volume, page 968. It is there shown that in the absence of a statute such an affidavit cannot be used to show that the verdict was determined by lot. Very full notes sustain this statement. This is true even in criminal cases, as shown in the same volume, and sustained by many courts cited in note 12. On page 977 of the same book it is stated, "In a few jurisdictions by statute, an affidavit of a juror is admissible to impeach a verdict determined by lot or by a

resort to the determination of chance." Notes relating to this show that in *Goodman vs. Cody*, 1st Wash. Ter., 329; 34 Am. Report, 808, that court states that such statute is in derogation of the common law.

A full brief, with the citations from all the courts, is made in Enc. P. & P., vol. 14, beginning with page 905. On page 906 of that volume it is stated in the text, "Such evidence is forbidden by public policy since it would disclose the secrets of the jury room and afford opportunity for fraud and perjury. It would open such a door for tampering with weak and indiscreet men that it would render all verdicts insecure, and, therefore, the law has wisely guarded against all such testimony and has considered it as unworthy of notice." Further, on page 908, the author quotes as follows: "It would be a most pernicious practice, and in its consequence dangerous to this much-valued mode of trial, to permit a verdict openly and solemnly declared in court to be subverted by going behind it and inquiring into the secrets of the jury room." The notes under this statement show a number of arguments of overwhelming weight and logic to sustain this rule.

"For the same reason hearsay evidence of the statements of jurors, showing misconduct, will also be excluded" (Same volume, page 911).

We have shown that practically all of the States in the Union hold evidence of jurors incompetent for the purpose of attacking their verdict. Thompson's Trials, vol. 2, page 1963. In opening chapter 72 the author states that this evidence is incompetent, and the facts showing that the verdict was a quotient verdict must be shown by evidence other than juror's. It remains, therefore, only to show what has been held by the circuit courts. The circuit courts have followed the rule as laid down by the English courts and the courts of the United States, and they have made this rule apply to criminal as well as civil cases. In *U. S. vs. Daubner*, 17 Fed Rep., at page 808, the circuit court, passing upon this very question, states that the rule that a juror might not explain

or attack his verdict must be held inviolate. In this case it held that affidavits should not be received, referred to Hilliard N. T., page 240, at length, showing the reason for the rule.

In *Chandler vs. Thompson*, 30 Fed. Rep., page 38, Circuit Court Judge Dick states, on page 45, "It is an old rule, and well settled that on a motion for a new trial a juror will not be allowed to explain the ground for their verdict." He cites many authorities to sustain this rule.

"Upon grounds of public policy the courts have almost universally agreed upon a rule that no affidavit, deposition, or sworn statement of a juror shall be received to impeach the verdict, or to explain it, or show on what grounds it was rendered." *Glaspell vs. Northern Pacific R. R. Company*, 43 Fed. Rep., page 909. In this case numerous text writers, as well as decisions, are cited.

We call especial attention to the case of *Pelzer Manufacturing Company vs. Hamburg-Bremen Fire Insurance Company*, 71 Fed. Rep., on page 826, where Judge Simonton quotes from *Mattox vs. U. S.*, and then states, "An examination of the long list of cases and of the text-books bearing on the question show that it is largely a matter of discretion, each case being in a measure a law unto itself. None of the cases permit a juror to impeach a verdict because of his own misconduct, or that of other jurors in the jury room, or to divulge the motives or the method by which they reached their verdict." The court here cites and adopts the rules as stated in Thompson and Merrian, and approves the leading cases, holding that such evidence is incompetent. In a recent case of *Chicago, M. and St. Paul Rwy. Co.*, 158 Fed. Rep., on page 994, the circuit court, in a few words, states that a juror can say nothing against the verdict.

We think, therefore, that no error was committed in refusing to consider either the affidavits of the plaintiff in error, as this was necessarily hearsay, as held by the courts in the cases we have cited, or in refusing to permit the jurors to be

sworn, that the verdict might be attacked. If jurors could attack their verdict after they had rendered it, there would scarcely be a case determined where a juror could not be found, when, after all restrictions were removed from him, he could not be influenced to make affidavits or give evidence showing irregularities and indicating reasons why the verdict should be set aside.

Respectfully submitted,

LOCKE CRAIG,
Attorney for Defendant in Error.

No. 283.

IN THE

Supreme Court of the United States,

October Term, 1913.

D. J. McDonald and the United States Fidelity and Guaranty Company, Petitioners,

vs.

J. W. Pless and J. W. Winbourne, Partners, Practicing Law under the firm name of Pless & Winbourne, Respondents.

BRIEF OF PETITIONERS.

ON MOTION FOR CERTIORARI.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1913.

D. J. McDONALD AND THE UNITED STATES FIDELITY AND GUARANTY COMPANY,
PETITIONERS,
vs.
J. W. PLESS AND J. W.WINBOURNE, PARTNERS, PRACTICING LAW UNDER THE FIRM NAME OF PLESS & WINBOURNE, RESPONDENTS.

ON MOTION FOR CERTIORARI.

BRIEF OF PETITIONERS.

The petitioner's second and third exceptions and second and third assignments of error in the Circuit Court of Appeals were based on the ruling of the District Court to the effect that the testimony of a juror would not be received and was incompetent where the testimony offered tended to show that the jurors had arrived at their verdict by chance, as set forth in the affidavit of the petitioner, D. J. McDonald, on page 20 of the record. The second and third assignments of error above referred to read as follows:

"II. The Court erred in refusing to permit a juror, A. K. Hyder, to answer the following question in regard to the method adopted by the jury in arriving at their verdict: 'Q. Mr. Hyder, I wish you would state to his Honor and the jury what was said by the foreman of the jury when the jury retired to their room as to the manner in which they should arrive at their verdict, and all

about the method by which the jury did arrive at their verdict.' The plaintiffs in the trial below objected to the foregoing question and any answer thereto. The court, addressing counsel for defendant, said: 'You propose to prove that when the jury went to their room to consider their verdict, the foreman suggested to them that each juror should put down on a piece of paper the amount he thought the plaintiffs ought to have; that that amount then be added up and divided by twelve, and that the quotient should be their verdict; they did that, and some of them as you allege went above $4,000; one perhaps for nothing, and that they arrived at their verdict in that way.' Upon being informed by counsel for defendant that this was what they proposed to prove, the court held and ruled that the testimony of the juror was incompetent and the court then and there sustained the plaintiff's objection to the question, and the defendant then and there excepted and the exception was signed, sealed and allowed by the court."

The Circuit Court of Appeals sustained the ruling of the Court below on the authority of Hyde v. United States, 225 U. S., 347, 381, 384; Mattox v. United States, 146 U. S., 140, 148, and a number of decisions of United States District and Circuit Courts and decisions of the Supreme Court of North Carolina, of which state the respondents are citizens and residents, and in which state the action was originally tried.

It is of course elementary that where the jurors agree in advance to be bound by the verdict determined by adding together the amounts the several jurors think should be given and dividing the sum by twelve, the verdict is void and a new trial must be granted.

29th Cyc. 812, 813,

and cases cited from fifteen or more States.

It is the position of the petitioners that the testimony of a juror is entirely competent to show that the jurors arrived at the verdict which was rendered in the case by lot or chance, and that the decisions of the United States Supreme Court which were principally relied on by the Circuit Court of Appeals as its authority for its decision

sustain this position. We are aware that this question has been the subject of a good deal of controversy and that the courts of the country do not agree concerning the same. We insist, however, that the best considered opinions and the reason of the thing, hold that the testimony of a juror may be received to show any fact or any act done which is outside of the personal consciousness of the juror so testifying.

In the case of Hyde v. United States, referred to above, it was claimed that the verdict was the result of an agreement between certain of the jurors who believed all of the defendants should be convicted, and certain jurors who believed that all of the defendants should be acquitted, by which agreement the acquittal of certain defendants was exchanged for the conviction of other defendants. In the opinion of the court it is said "that the testimony of jurors should not be received to show matters which essentially inhere in the verdict itself and necessarily depend upon the testimony of the jurors and can receive no corroboration." In making this statement, the court expressly affirms the rule laid down in Wright vs. Illinois and Mississippi Telegraph Company, 20 Iowa, 195, and Gottlieb Bros. vs. Jasper & Company, 27 Kan., 770. The case of Wright vs. Telegraph Company is among those most strongly relied upon by the petitioners in the Circuit Court of Appeals to sustain their position. In this case the court says:

"But to receive the affidavit of a juror as to the independent fact that the verdict was attained by a lot or game of chance, or the like, is to receive his testimony to a fact, which if not true can be readily and certainly disproved by his fellow-jurors; and to hear such proof would have a tendency to diminish such practices and to purify the jury room by rendering such improprieties capable and probably of exposure, and consequently deterring jurors from resorting to them."

In this case it is also pointed out that the fact that the verdict was determined by aggregation and average or by lot or other improper manner, is not a matter which essentially inheres in the verdict itself.

We have not at present access to the case of Gottlieb Bros. v. Jasper & Company, the Kansas case cited above, but presume that the rule there stated is similar to the rule in the case of Wright vs. Telegraph Company.

The Supreme Court of Kansas has repeatedly laid down a rule similar to that in the Wright case, both prior and subsequent to the decision of the case of Gottlieb Bros. vs. Jasper & Company.

In Perry v. Bailey, 12 Kan., 539, 544, Justice Brewer, in delivering the opinion of the court, said:

"As to all those matters lying outside the personal consciousness of the individual juror, those things which are matters of sight and hearing, and therefore accessible to the testimony of others, and subject to contradiction—'overt acts,' as a Massachusetts court expresses it—it seems to us that the interests of justice will be promoted, and no sound public policy disturbed, if the secret of the jury box is not permitted to be the safe cover for the perpetration of wrongs upon parties litigant."

To the same effect are the cases of Johnson vs. Husband, 22 Kan., 277, 285, and Wichita v. Stallings, 59 Kan., 779, 54 Pac. 689.

A similar ruling obtains in the states of Nebraska, Tennessee and Texas (criminal cases).

Wigmore on Evidence, Sections 2353-2354.

A full and complete discussion of the question is to be found in Wigmore on Evidence, Sections 2353 and 2354, where the decisions of the English and American courts are collected.

The second case upon which the Circuit Court of Appeals depends largely in support of its decision is that of Mattox v. United States, 146 U. S., 140. In this case jurors' affidavits that newspaper comments were read to them while the jury was considering its verdict, and that the bailiff made statements concerning the cause, were admitted, and the case of Perry v. Bailey, 12 Kan., above mentioned, was approved.

In the Mattox case the Supreme Court says:

"There is, however, a recognized distinction between what may and what may not be established by the testimony of jurors to set aside a verdict.

"The distinction is thus put by Mr. Justice Brewer, speaking for the Supreme Court of Kansas in Perry v. Bailey, 12 Kans., 539-545: 'Public policy forbids that a matter resting in the personal consciousness of one juror should be received to overthrow the verdict, because being personal it is not accessible to other testimony; it gives to the secret thought of one the power to disturb the express conclusions of twelve; its tendency is to produce bad faith on the part of a minority, to induce an apparent acquiescence with the purpose of subsequent dissent; to induce tampering with individual jurors subsequent to the verdict. But as to overt acts, they are accessible to the knowledge of all the jurors; if one affirms his conduct, the remaining eleven can deny; one cannot disturb the action of the twelve; it is useless to tamper with one, for the eleven may be heard. Under this view of the law the affidavits were properly received. They tended to prove something which did not essentially inhere in the verdict, an overt act, open to knowledge of all the jury, and not alone within the personal consciousness of one.'

"The subject was much considered by Mr. Justice Gray, then a member of the Supreme Judicial Court of Massachusetts, in Woodward v. Leavitt, 107 Mass., 453, where numerous authorities were referred to and applied, and the conclusions announced, 'that on a motion for a new trial on the ground of bias on the part of one of the jurors, the evidence of jurors as to the motives and influences which affected their deliberations, is inadmissible either to impeach or to support the verdict. But a juryman may testify to any facts bearing upon the question of the existence of any extraneous influence, although not as to how far that influence operated upon his mind. So a juryman may testify in denial or explanation of acts or declarations outside of the jury room, where evidence of such acts has been given as ground for a new trial.' See also Ritchie v. Holbroke, 7 S. & R., 458; Chews v. Driver, 1 Coxe (N. J.), 166; Nelms v. Missis-

sippi, 13 Sm. & Marsh., 500; Hawkins v. New Orleans Printing Co., 29 La. Ann., 134, 140; Whitney v. Whitney, 5 Mass., 405; Hix v. Drury, 5 Pick., 296.

"We regard the rule thus laid down as conformable to right reason and sustained by the weight of authority. These affidavits were within the rule, and being material their exclusion constitutes reversible error. A brief examination will demonstrate their materiality."

It will thus be seen that matters resting in the personal consciousness of the jurors are excluded, but that matters which are capable of being proven by others than the juror actually testifying or capable of being disproven by others, may be proven by the jurors themselves.

The petitioners would also suggest to the court that an examination of the cases from United States Circuit and District Courts, cited by the Circuit Court of Appeals in support of its decision of this case, will show that some of the cases at least are not in point, but refer to evidence of jurors as to the grounds of their verdict or the effect of certain acts on their minds, which is universally admitted to be clearly incompetent.

It is the position of the petitioners that the fact that a verdict was arrived at by the quotient method, is not a matter resting in the personal consciousness of the jurors; that the finding of a verdict in this manner is an overt act which if falsely alleged by one juror could be easily disproven by the evidence of the remaining eleven jurors; and that for that reason the affidavit of the juror offered in the court below in this case came within the rule laid down by the Supreme Court ofthe United States in the Mattox case, and within the rule laid down by the Supreme Court of Kansas in the Wright case and approved by the Supreme Court of the United States in the case of Hyde v. United States, above referred to, and should have been received in evidence; and that the decision of the Circuit Court of Appeals, based largely upon the opinion of this court in the Hyde case and the Mattox case, is in fact contrary to the rule laid down in those

cases and the decree of the Circuit Court of Appeals rendered herein should for that reason be reversed.

JULIUS C. MARTIN,
THOMAS S. ROLLINS,
GEORGE H. WRIGHT.

19

Supreme Court of the United States.

OCTOBER TERM, 1914.

No. 283.

D. J. McDONALD AND THE UNITED STATES FIDELITY AND GUARANTY COMPANY,
PETITIONERS.

vs.

J. W. PLESS AND J. W. WINBORNE, PARTNERS, PRACTICING LAW UNDER THE FIRM NAME OF PLESS & WINBORNE.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF OF PETITIONERS.

Supreme Court of the United States.

OCTOBER TERM, 1914.

No. 283.

D. J. McDONALD AND THE UNITED STATES FIDELITY AND GUARANTY COMPANY,
PETITIONERS.

vs.

J. W. PLESS AND J. W. WINBORNE, PARTNERS, PRACTICING LAW UNDER THE FIRM NAME OF PLESS & WINBORNE.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF OF PETITIONERS.

I.

STATEMENT OF CASE.

This was an action brought in the Superior Court of the County of McDowell, State of North Carolina, on the 2nd day of February, 1911 (Record, p. 1). The plaintiffs were J. W. Pless and J. W. Winborne, partners, practicing law under the firm name of Pless & Winborne. D. J. McDonald was the original defendant in the cause. The cause was removed to the Circuit Court of the United States on the petition of the defendant, D. J. McDonald, on the 20th day of February, 1911 (Record, pp. 7-8). Before the removal of the cause to the United States Circuit Court, the plaintiffs, Pless & Winborne, procured an attachment against the property of McDonald situated in North Carolina, and caused the same to be levied upon

said property (Record, p. 4). This attachment was discharged upon the filing by D. J. McDonald of the usual bond to discharge an attachment, with the United States Fidelity and Guaranty Company as surety thereon (Record, pp. 5-6).

In the United States Circuit Court the plaintiffs, Pless & Winborne, filed a complaint seeking to recover of the defendant, D. J. McDonald, the sum of $4,000 alleged to be due them on account of professional services rendered by said plaintiffs to said defendant as his attorneys in certain litigation theretofore pending in the courts of North Carolina (Record, pp. 9-10). The defendant, McDonald, answered the complaint and denied the indebtedness (Record, pp. 11-14).

At the Adjourned Term of the United States District Court at Asheville, held in January, 1912, the case was tried before his Honor, James E. Boyd, District Judge, and a jury, and resulted in a verdict and judgment in favor of the said Pless & Winborne, and against the said D. J. McDonald and the United States Fidelity and Guaranty Company, the surety on his bond for the discharge of the attachment, for the sum of $2,916. (Record, p. 15). From this judgment a writ of error was prosecuted to the Circuit Court of Appeals for the Fourth Circuit (Record, p. 24). In the Circuit Court of Appeals the judgment of the District Court was affirmed (Record, p. 29). Thereupon, the petitioners, D. J. McDonald and the United States Fidelity and Guaranty Company, filed in this Court their petition for a writ of certiorari, which was granted by this Court on the 29th day of October, 1913 (Record, p. 31).

After the jury had brought in their verdict, finding in favor of the plaintiffs in the sum of $2,916, (Record, pp. 15, 17), the defendants made a motion to set aside the verdict for alleged misconduct on the part of the jury, as set out in the affidavits filed in the cause by the defendant, D. J. McDonald, (Record, pp. 17, 18, 20). In support of the motion of the said defendants to set aside the verdict, the defendants caused four of the jurors who had sat and acted as jurors in the trial of said cause, and who had joined in the rendition of the verdict, to be duly sworn, and thereupon offered one of said jurors as a witness be-

fore the court and proposed to prove by said juror the facts set forth in the said affidavits of the said D. J. McDonald. The Court, being of the opinion that the testimony of said jurors was incompetent to prove the facts alleged in said affidavits, upon objection by counsel for the plaintiffs, excluded said testimony and refused to consider the same. To this ruling of the court the defendants excepted.

II.

SPECIFICATION OF ERRORS.

The defendants specified error as follows:

After the defendants had offered to the court the affidavits of D. J. McDonald, set out in the record on pages 17 to 19, to the effect that after the jury had retired and while they were considering their verdict, it was proposed by one member of the jury and acquiesced in by the others that each member of the jury should state what amount he thought the plaintiffs were entitled to recover and that the aggregate amounts so stated by the twelve jurors should be divided by twelve and the quotient or net result of the division should be taken and considered as the verdict of the jury; that this agreement was made and entered into by the jury before the amount of the verdict was actually decided upon; that some of the jurors in stating the amount they thought plaintiffs were entitled to recover fixed the sum of $5,000, which was $1,000 more than the plaintiffs had sued for.

The Assignments of Error are stated as follows:
(Record, pp. 23-24).

1.

"That said District Court erred in sustaining the plaintiffs' objection to the following question propounded to the plaintiff, J. W. Pless, on cross-examination: 'Q. Will you kindly state to his Honor and the jury what amount of money you took in from professional services rendered to others than the defendant from April 15, 1909, the time when you were employed by Mr. McDonald, until January 1, 1911, when you were retired from the case?' said assignment of error being the basis of the defend-

ants' first exception in the bill of exceptions filed in this cause.

T.

"The Court erred in refusing to permit the juror, A. K. Hyder, to answer the following question in regard to the method adopted by the jury in arriving at their verdict: 'Q. Mr. Hyder, I wish you would state to his Honor and the jury what was said by the foreman of the jury when the jury retired to their room as to the manner in which they should arrive at their verdict, and all about the method by which the jury did arrive at their verdict.' The plaintiffs in the trial below objected to the foregoing question and any answer thereto. The Court, addressing counsel for defendant, said: 'You propose to prove that when the jury went to their room to consider their verdict, the foreman suggested to them that each juror should put down on a piece of paper the amount he thought the plaintiffs ought to have; that that amount be then added up and divided by twelve, and that the quotient should be their verdict; they did that, and some of them as you allege went above the $4,000; one perhaps, for nothing, and that they arrived at their verdict in that way.' Upon being informed by counsel for defendants that this was what they proposed to prove, the court held and ruled that the testimony of the juror was incompetent and the court then and there sustained the plaintiffs' objection to the question, and the defendants then and there excepted and the exception was signed, sealed and allowed by the court.

3.

"That the court erred in holding and ruling that the testimony of a juror is not competent to impeach his verdict.

4.

"That the court erred in refusing to set aside the verdict of the jury.

5.

"The Court erred in signing the judgment in favor of the plaintiffs and against the defendant, D. J. McDonald.

and the United States Fidelity and Guaranty Company, the surety upon the bond filed by the defendant in this cause to dissolve the attachment."

ARGUMENT.

The error mainly relied upon in this case is that assigned by the second, third and fourth assignments of error, and relates to the action of the Court in refusing to hear the testimony of the juror, A. K. Hyder, as to the method adopted by the jury in arriving at their verdict. It seems to be the settled law that where it can be lawfully proven that the jurors arrived at their verdict by what is sometimes called the quotient method, such verdict must be set aside by the Court.

29 Cyc., 812, 813.

The trial court excluded the testimony offered by the petitioners tending to show that the verdict had been arrived at as hereinbefore pointed out. We insist that according to the decisions of this Court and also according to the decisions of many of the courts of this country, such testimony was competent and that it should have been received and considered by the court in this case. The Court of Appeals sustained the ruling of the District Court Judge on the authority of the following cases:

Hyde v. United States, 225 U. S., 347, 381, 384;
Mattox v. United States, 146 U. S., 140, 148, and several other decisions of Circuit and District Courts of the United States, and of several of the states.

The decisions on this question seem to be in much conflict. As we view the above decisions of the Supreme Court of the United States, they do not determine the question against the contention of the petitioners. It seems to us that the best considered cases are those which hold that the testimony of a juror may be received *to show, any fact or any act done outside of the personal consciousness of the juror so testifying* and which may be contradicted by the other jurors if called as witnesses. There seems to be no doubt that the testimony of a juror is competent to sustain a verdict of a jury when attacked, and if

the question propounded to the juror would, if answered, elicit testimony which may be refuted by the testimony of other jurors, the testimony is competent.

In the case of Gottlieb Brothers vs. Jasper & Company, 27 Kan., 770, cited in the Hyde case above mentioned, it was decided that the testimony or affidavit of a juror is not competent as to any matter which essentially inheres in the verdict, but is competent as to facts which transpire within his own personal observation and which transpired in such manner that others as well as himself could be cognizant of them and could testify to them. The court says in that case: "It makes no difference that these facts may prove or tend to prove that the jurors were unduly influenced or that a court might infer from them that the juror was unduly influenced, nor can it make any difference that these facts might prove or disprove something which inheres in a verdict itself; all that is necessary is that the facts should be such that two or more persons might personally take cognizance of them and might testify to them and that the facts themselves to which the jurors may testify do not inhere in the verdict as an essential part or portion thereof."

In the case of Wright vs. Illinois and Mississippi Telegraph Co., 20 Iowa, 195, the Court says:

"But to receive the affidavit of a juror as to the independent fact that the verdict was attained by a lot or game of chance, or the like, is to receive his testimony to a fact which if not true can be readily and certainly disproved by his fellow-jurors; and to hear such proof would have a tendency to diminish such practices and to purify the jury room by rendering such improprieties capable and probable of exposure, and consequently deterring jurors from resorting to them."

The point decided in the Wright case was precisely like the point in the present case and the court held that the testimony of a juror was not a matter which essentially inheres in the verdict itself and was therefore competent.

In the case of Perry vs. Bailey, 12 Kan., 539, 544, Justice Brewer, in delivering the opinion of the Court, says:

"As to all those matters lying outside the personal consciousness of the individual juror, those things which are matters of sight and hearing, and therefore accessible to the testimony of others, and subject to contradiction—'overt acts,' as a Massachusetts court expresses it—it seems to us that the interests of justice will be promoted, and no sound public policy disturbed, if the secret of the jury box is not permitted to be the safe cover for the perpetration of wrongs upon parties litigant."

In the case of Mattox vs. United States, 146 U. S., 140, affidavits of jurors were admitted to show that newspaper comments on the case under consideration were read to them while the jurors were considering their verdict and that the bailiff made statements to them concerning the cause and the verdict was set aside on that ground. In that case the Court said:

"There is, however, a recognized distinction between what may and what may not be established by the testimony of jurors to set aside a verdict.

"The distinction is thus put by Mr. Justice Brewer, speaking for the Supreme Court of Kansas in Perry vs. Bailey, 12 Kans., 539, 545: 'Public policy forbids that a matter resting in the personal consciousness of one juror should be received to overthrow the verdict, because being personal it is not accessible to other testimony; it gives to the secret thought of one the power to disturb the express conclusions of twelve; its tendency is to produce bad faith on the part of a minority, to induce an apparent acquiescence with the purpose of subsequent dissent; to induce tampering with individual jurors subsequent to the verdict. But as to overt acts, they are accessible to the knowledge of all the jurors; if one affirms his conduct, the remaining eleven can deny; one cannot disturb the action of the twelve; it is useless to tamper with one, for the eleven may be heard. Under this view of the law, the affidavits were properly received. They tended to prove something which did not essentially inhere in the verdict, an overt act, open to knowlegde of all the jury, and not alone within the personal consciousness of one.'

"The subject was much considered by Mr. Justice

Gray, then a member of the Supreme Court of Massachusetts, in Woodward v. Leavitt, 107 Mass., 453, where numerous authorities were referred to and applied, and the conclusions announced, 'that on a motion for a new trial on the ground of bias on the part of one of the jurors, the evidence of jurors as to the motives and influences which affected their deliberations, is inadmissible either to impeach or to support the verdict. But a juryman may testify to any facts bearing upon the question of the existence of any extraneous influence, although not as to how far that influence operated upon his mind. So a juryman may testify in denial or explanation of acts or declarations outside of the jury room, where evidence of such acts has been given as ground for a new trial.' See also Ritchie v. Holbroke, 7 S. & R., 458; Chews v. Driver, 1 Coxe, (N. J.), 166; Nelms v. Mississippi, 13 Sm. & Marsh., 500; Hawkins v. New Orleans Printing Co., 29 La. Ann., 134, 140; Whitney v. Whitney, 5 Mass., 405; Hix v. Drury, 5 Pick., 296.

"We regard the rule thus laid down as conformable to right reason and sustained by the weight of authority. These affidavits were within the rule, and being material their exclusion constitutes reversible error. A brief examination will demonstrate their materiality."

The petitioners contend that several of the decisions cited by the Circuit Court of Appeals are not in point, but refer to evidence of jurors as to the grounds of their verdict or as to the effect of certain acts on their minds and that such testimony was excluded on the ground that it was the personal consciousness of the juror which was attempted to be proven by the testimony of the juror and not an act or acts which the other jurors might be called to dispute. The finding of a verdict in the manner set out in this record is a fact which might be denied by any of the jurors if it is not true, and for that reason it seems to us the testimony was competent, and that the court was in error in excluding the testimony as pointed out in the record.

In addition to the authorities above referred to, the cases of Citizens Bank vs. Carey, 48 Southwestern, 1012, 2 Ind. Ter., 84, and of Johnson vs. Husband, 22 Kans.,

277; Atcheson T. & S. F. R. Co. vs. Bayes, 42 Kans., 609, 22 Pac., 741, will be found to be directly in point. But, without going to the decisions of the Supreme Courts of the states, it seems to us that the case of Mattox v. United States, 146 U. S., 140, where the doctrine announced in Perry vs. Bailey, 12 Kans., 539, is followed and approved, is authority for the position of the petitioners in this cause. In the Mattox case the opinion was delivered by the late Chief Justice Fuller, and the opinion of this court in the case of United States vs. Reid, 12 How., 361, 366, delivered by Chief Justice Taney, is quoted from at length, and the Court says that while affidavits of jurors must be received with great caution, it seems that there are exceptions to the rule and that when the interest of justice demands it such affidavits will be received where the matter sworn to does not inhere directly in the verdict.

We do not regard the point in this case as having been precluded by the decision of this court in the case of Hyde vs. United States, supra. There may be other distinctions, but it occurs to us that in the Hyde case the agreement between the jurors mentioned may not have been made by all of the jurors, and besides it was an agreement as to the verdict itself and necessarily inheres in the verdict, but in this case the agreement was not the verdict, but fixed a method by which the verdict might be arrived at. In this case any juror would have been at liberty to withdraw from the agreement when the quotient had been made up, and it could not be said that the agreement to take the average opinion of the jurors as the verdict was as directly connected with the result as was the agreement in the Hyde case.

JULIUS C. MARTIN,
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Attorneys for Petitioners.

Asheville, N. C.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 283.

D. J. McDONALD AND THE UNITED STATES FIDELITY AND GUARANTY COMPANY, PETITIONERS,

vs.

J. W. PLESS AND J. W. WINBOURNE, PARTNERS, PRACTICING LAW UNDER THE FIRM NAME OF PLESS & WINBOURNE, RESPONDENTS.

REPLY BRIEF FOR PETITIONERS.

JULIUS C. MARTIN,
THOMAS S. ROLLINS,
GEORGE H. WRIGHT,
Attorneys for Petitioners.

(23,912)

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1914.

No. 283.

D. J. McDONALD AND OTHERS, PETITIONERS,

vs.

J. W. PLESS AND OTHERS.

REPLY BRIEF FOR PETITIONERS.

1. The learned counsel for the respondents, in his brief filed in this cause, concedes that where a verdict of a jury has been reached by the quotient method it is illegal. This is in accordance with the law of North Carolina, and the decisions of all the courts which we have examined; but he takes the position that the testimony of a juror is incompetent to show that a verdict was arrived at by such method. He seems to base his argument mainly on the North Carolina holdings, insisting that the United States courts must be governed by the North Carolina decisions on this question in this kind of a case. We concede that the Supreme Court of North Carolina in Purcell *vs.* Railroad, 119 N. C., at page 739, decided this question adversely to our contention. We desire, however, to

call this honorable court's attention to the fact that the Purcell case was based on other decisions of the Supreme Court of North Carolina which involved an entirely different principle from that announced in the Purcell case. The cases cited by the court were cases where an effort was made to prove by a juror matters and things which could be known only to the juror whose testimony was offered. It was an effort to prove matters and things within the consciousness of the juror, and only within the consciousness of the juror, offered as a witness, while, as we insist, the quotient method of arriving at a verdict is an overt act not entering in the consciousness of any juror, but known to all of them where it occurs. It is something which may be proven or disproven by the testimony of all the jurors because all participated. It does not call for the opinion of any juror.

Passing for the moment to the other phase of the question—that is, whether the United States court must be governed in cases of this kind by the decisions of the State court—we most respectfully submit that the statutes of the United States, R. S., sections 721 and 914, do not cover this question. The rule concerning following State law, as announced by this court in the leading and well-considered case of Burgess *vs.* Seligman, 107 U. S., 20, 33-35, sustains our position. In that case this court said that where decisions of the State court become rules of property, and especially where decisions are applicable to real estate and to the construction of State constitutions and State statutes, and are settled by a well-considered line of decisions, the Federal courts will follow the State holdings. On the other hand the court says:

> "But where the law has not been thus settled, it is the right and duty of the Federal courts to exercise their own judgment; as they always do with reference to the doctrine of commercial law and *general jurisprudence.*"

The exact question here is not one of the competency or incompetency of evidence generally. It has no relation to any State statute or to local law, but involves the very fountainhead of justice, and involves the right and duty of a court to investigate and determine whether or not the verdicts of juries have been arrived at by unlawful methods, and whether or not the door has been thrown open so that the verdicts of juries may be contaminated by extraneous influences. The decisions of the Supreme Court of North Carolina, carried to their logical conclusion, would prevent the calling of a juror to show that his verdict had been rendered through a threat of personal injury to himself by other jurors; would prevent the calling of a juror to show that money had been paid to himself or another juror for his verdict; would prevent the calling of a juror to prove that the jurors had read newspapers or other papers concerning the case without the permission of the court; and, in fact, would exclude all testimony of every kind and nature which bears upon the conduct of the jurors while considering their verdict. Such holdings are not the law, and in fact we do not believe that the Supreme Court of North Carolina intends to go to that length.

It is well settled that the Revised Statutes, section 914, does not require the Federal courts to conform to the State practice in many particulars. It does not forbid judges in instructing juries to express an opinion on the facts.

Knight *vs.* Ill. Central R. R. Co., 180 Fed., 368; 103 C. C. C., 514.

It does not apply so as to require written instructions to be taken by the jury on retiring, or so as to permit papers read in evidence to be taken by the jury, and in several other particulars of like kind. See Knight *vs.* Ill. Central R. R. Co., *supra*.

The rule does not apply to holdings of the court on a motion for a new trial, which is a matter of discretion.

Satchtmacker *vs.* Jacksonville Towing & Wrecking Co., 181 F., 276.

The right of a Federal court to set aside, vacate, or modify its earlier rulings or judgment in a cause at any time during the term is inherent and unaffected by the provisions of a statute regulating the practice in the State courts.

So. Pac. Co. *vs.* Kelly, 187 Fed., 937; 109 C. C. A., 659.

The rule, of course, does not apply in any criminal case.

Logan *vs.* United States, 144 U. S., 263.

Neither does it apply in cases where the statutes of the United States or the Constitution of the United States are in any way involved.

The Circuit Court of Appeals for the Eighth Circuit, in the case of Union Pacific Railroad Co. *vs.* Yates, 79 Fed., 584; 25 C. C. A., 103, held as follows:

> "But the decisions of the courts of a State construing common-law rules of evidence are not obligatory on the Federal courts. Such decisions are merely persuasive authority, and, while the Federal courts will follow them when the question at issue is balanced with doubt, yet they will not be governed by such decisions when they appear to be at variance with the great weight of authority. Burgess *vs.* Seligman, 107 U. S., 20, 2 Sup. St., 10; Railroad Co. *vs.* Baugh, 149 U. S., 368, 372, 13 Sup. St., 914; Ryan *vs.* Staples, 40 U. S. App., 427, 23 C. C. A., 541, and 76 Fed., 721, 727; Railroad Co. *vs.* Hogan, 27 U. S. App., 184, 11 C. C. A., 51, and 63 Fed., 102."

The question as to how far the United States courts are bound by the decisions of the State courts was re-examined by this court in the case of B. & O. Railroad Co. *vs.* Baugh, 149 U. S., 368. Here the case of Burgess *vs.* Seligman was approved and the general conclusion announced that the United States courts were not governed by State decisions when the question involved was one of general law and not

local law. If we follow the Baugh case, it must be admitted that the United States courts ought to exercise their independent judgment on the question involved here. The State courts are in conflict on the subject, and if the United States courts undertook to follow the court of the State where the particular district court happened to be sitting at the time of the trial, we would have interminable confusion in the decisions of the United States courts.

It has been decided that section 914 R. S., does not require Federal judges to conform to State regulations in the submission of cases and the control of the deliberations of juries, such proceedings being governed by the common law.

Liverpool, &c., Ins. Co. *vs.* N. and M. Friedman Co., 133 Fed., 713.

This case was tried in Michigan. Under the Michigan practice the separation of jurors after the submission of the case, although by permission of the judge, vitiates the verdict, and it was contended that by virtue of section 914, R. S. U. S., such separation of the jurors would vitiate a verdict in a case tried in the Federal court. The court of appeals, the late Justice Lurton presiding, held otherwise, saying that section 914 no more places Federal judges under State regulations in controlling the jurors than in charging them. The power of Federal judges in the submission of cases and the control of the deliberations of jurors remains as at common law. The court cited from Nudd *vs.* Burrows, 91 U. S., 426-444, as follows:

> "The identity required by section 914 is to be in the practice, pleadings, and forms and modes of proceedings. The personal conduct and administration of the judge in the discharge of his separate functions is, in our judgment, neither practice, pleading nor a form nor mode of proceeding within the meaning of those terms as found in the context."

See also

Railroad Co. *vs.* Horst, 93 U. S., 291, 300.

Chattanooga Iron Co. *vs.* Petitioner, 128 U. S., 544, 554.

Decisions of the State courts on questions of general jurisprudence are not binding on Federal courts and cannot be appealed when the Federal courts in the exercise of an independent judgment reach a different conclusion.

Lake Shore, &c., R. R. Co. *vs.* Prentice, 147 U. S., 101.
Manship *vs.* New South Building, &c., Asso., 101 Fed., 845.
Union Bank *vs.* Oxford, 90 Fed., 7.

In fact, the better opinion seems to be that the Federal courts show their respect for and deference to the settled decisions of the highest court of the State, and follow them in two classes of cases, one where the decision relates to the interpretation or validity of the written or statutory laws of the State if the Federal constitution be not involved, and the other where the matter decided relates to the acquisition of rights to, or interests in, or liens upon property located in the State. In cases outside of these two classes, where the matter to be decided is one of general jurisprudence, the Federal courts refuse to be bound by the decisions of the highest State courts and exercise their own independent judgment.

U. S. Savings, &c., Co. *vs.* Harris, 113 Fed., 27.

It has also been decided that section 914 is limited strictly to local statutes and local usages, and does not extend to general principles and doctrines of general jurisprudence.

Swift *vs.* Tyson, 16 Pet., 19.
Brooklyn, &c., R. R. Co. *vs.* Nat. Bank, 102 U. S., 14.
Oates *vs.* Montgomery First Nat. Bank, 100 U. S., 239.
Boyce *vs.* Tabb, 18 Wall., 546.

There are decisions to the effect that the rule laid down by section 914 does not apply in any case except to statutory law.

Wallace *vs.* Chesapeake, &c., R. R. Co., 95 Fed., 398.

A State statute regulating the manner in which the court shall charge the jury does not control the Federal courts.

Grimes Drygoods Co. *vs.* Malcom, 164 U. S., 490.
Lincoln *vs.* Power, 151 U. S., 442.
U. S. Mutual Accident Asso. *vs.* Barry, 131 U. S., 120.

The granting or denial of a change of venue is not a matter within the control of the State practice.

Kenyon *vs.* Gilmer, 131 U. S., 24.

State statutes forbidding judges to express any opinion upon the facts do not control in the Federal court.

Vicksburg, &c., R. R. Co. *vs.* Putnam, 118 U. S., 553.
Mitchell *vs.* Harmony, 13 How., 115.
St. Louis, &c., R. R. Co. *vs.* Vickers, 122 U. S., 363.

State statutes requiring instructions to be put in writing are not binding on the United States courts.

Lincoln *vs.* Power, 151 U. S., 442.

State statutes requiring the court upon request of either party to direct the jury to find a special verdict do not bind the United States courts.

U. S. Mutual Accident Asso. *vs.* Barry, 131 U. S., 119.

Motions for new trials are in the discretion of the court and cannot be controlled by State statute.

See Federal Statutes, Annotated, volume 4, page 575.

> "The main purpose of the conformity act was to harmonize, as nearly as may be, the manner and form in which parties should present their claims and defense in the preparation of the trial of cases in the Federal courts, to those prevailing in the State courts, and it was not the intention to require the Federal

courts to conform to State courts in all matters of detail respecting practice and procedure, at least as to such details the power to regulate which every court is presumed inherently to possess and exercise as from time to time the ends of justice may require. Such are the details respecting matters of continuance, intermediate motions, new trials, and other incidental powers respecting the control of the parties, or the situation of the case in the court. Manitowoc Malting Co. *vs.* Feuchtwanger (E. D. Wis., 1912), 196 Fed., 506. See also Steers *vs.* United States (C. C. A., 6th Cir., 1911), 192 Fed., 1, wherein it was held that matter pertaining to the conduct of the trial by the trial judge is not governed by this conformity act."

Federal Statutes, Annotated, Supp. 1914, p. 702.

2. Passing to the main question again—

In Hyde *vs.* United States, 225 U. S., 347, it was proposed to prove that certain of the jurors who believed all the defendants should be convicted agreed with certain other jurors who believed that all the defendants should be acquitted; that the acquittal of two defendants was exchanged for the conviction of two.

This court held that to receive such testimony would be to permit the jurors to state matters which *essentially adhere in the verdict itself,* and depend entirely upon the testimony of the jurors and could receive no corroboration.

Mr. Justice Stafford, who delivered the opinion denying the motion of the defendants for a new trial in the Supreme Court of the District of Columbia, says:

"To attempt to support these motions by the testimony of a juror who entered into the agreement would be to ask him what were his judgment and opinion on the evidence; and unless he admitted that his opinion was contrary to his verdict his testimony would not support the motions.

"No juror who did not enter into the agreement

> could possibly know what the judgment and opinion of the other jurors upon the evidence may have been. And so, if the motion is to be understood as meaning that only a portion of the jury entered into this agreement, while as to the remaining portion the verdict rendered was a true one, those who were not included in it could not testify to the only vital point in the allegation."

To allow the jurors to testify that they voted for guilty against their convictions would be to permit them to testify to matters known only to the jurors so testifying.

Again, in the Hyde case, it does not appear that all the jurors were alleged to have entered into the agreement, while in the instant case all were involved in the agreement.

In fact, this court puts the Hyde decision expressly on the ground that the testimony offered was of matters which necessarily inhere in the verdict. Here, as we contend, the mechanical method of arriving at a verdict involves no matter adhering in the verdict itself.

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Attorneys for Petitioners.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 283.

D. J. McDONALD and THE UNITED STATES FIDELITY AND GUARANTY COMPANY, Petitioners,

vs.

J. W. PLESS and J. W. WINBOURNE, Partners, &c., as Pless & Winbourne.

BRIEF OF RESPONDENTS.

JOSEPH W. BAILEY,
Attorney for Respondents.

SUPREME COURT OF THE UNITED STATES.

October Term, 1914.

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BRIEF OF RESPONDENTS.

Statement of the Case.

This suit was instituted on February 2, 1911, in the Superior Court of McDowell County, North Carolina, where Pless and Winbourne, the respondents here, were plaintiffs and McDonald, the petitioner here, was defendant. The suit was to recover $4,000 and interest due as attorneys' fees. Upon a proper petition presented by McDonald the case was removed to the Circuit Court of the United States (now the District Court) for the Western District of North Carolina, where it was tried before a jury and a verdict for $2,916, with interest from February 2, 1911, was returned in favor of

the plaintiffs. The defendant then moved the court to set aside the verdict, and in support of that motion submitted two affidavits made by himself alleging certain misconduct of the jury in arriving at their verdict. Thereupon the court announced that it would hear any evidence which the defendant might offer tending to show that the jury had arrived at their verdict in the manner set forth in these affidavits. The defendant then had four of the jury called and sworn at the clerk's desk. The juror A. K. Hider was first called to testify, and he was asked the following question:

> "I wish you would state to his honor and the jury what was said by the foreman of the jury when the jury retired to their room as to the manner in which they should arrive at their verdict, and all about the method by which the jury did arrive at their verdict."

Counsel for the plaintiffs objected to that question, the court sustained the objection, and counsel for the defendant excepted. The record, page 20, discloses this further proceeding:

> "The court said:
>
> " 'You propose to prove that when the jury went to their room to consider their verdict the foreman suggested to them that each juror should put down on a piece of paper the amount he thought the plaintiffs ought to have; that that amount then be added up and divided by twelve and that the quotient should be their verdict; they did that, and some of them, as you allege, went above the $4,000, one perhaps for nothing, and that they arrived at their verdict in that way.'
>
> "Mr. ROLLINS: Yes, sir.
>
> "The COURT: I hold that the testimony of a juror is not competent to impeach his verdict. You may have an exception."

The court entered judgment in accordance with the verdict, and a writ of error was granted by the Circuit Court of Appeals for the Fourth Circuit.

There were five exceptions reserved, but the only one insisted on in the Circuit Court of Appeals was to the action of the district court in refusing, on a motion for new trial, to receive the testimony of jurors to impeach their verdict.

The Circuit Court of Appeals for the Fourth Circuit affirmed the judgment of the District Court of the United States for the Western District of North Carolina, and the case was brought to this court on a writ of certiorari.

ARGUMENT.

I.

THE TRIAL COURT DID NOT ERR IN REFUSING TO RECEIVE THE TESTIMONY OF JURORS, OFFERED IN SUPPORT OF THE MOTION FOR A NEW TRIAL, TO IMPEACH THEIR VERDICT.

I freely concede that a jury has no right to agree in advance that it will determine the sum to be awarded in any case by adding together the amount which each juror thinks proper and dividing the total thus obtained by twelve; and I also freely concede that a verdict reached in that way is illegal. But the foregoing concessions do not establish that the court erred in rejecting the testimony of the jurors in this case when they were tendered as witnesses to prove that they had reached their verdict by a process of addition and division.

In the first place, neither the question propounded to the witness Hider, nor the interpretation of that question as stated by the court and assented to by the attorney for McDonald, assumed that the jury had agreed in advance to abide the result of the method proposed; and even in those jurisdictions where the testimony of jurors is received to show a "quotient verdict," an antecedent and binding agreement is an element essential to the granting of a new trial.

In the second place, even if the jury had rendered a

"quotient verdict" under an antecedent and binding agreement, the testimony of the jurors was properly rejected, because such misconduct, according to the law of North Carolina, cannot be proved by the testimony of the jurors themselves, and as this case was tried by a Federal court sitting in that State the same rule was properly applied.

There are several decisions of the highest court in North Carolina asserting the general proposition that the testimony of a juror cannot be received to impeach his verdict; and even if they stood alone, I think they would clearly justify the action of the trial court in this case. But fortunately we are relieved from the necessity of deducing the particular rule applicable to this case from the general rule stated in the other cases, because in Purcell *vs.* R. R., 119 N. C., 739, the very question of a "quotient verdict" was presented and the court, holding the testimony of jurors inadmissible for the purpose of impeaching it, said:

> "The evidence of a juror cannot be heard to impeach his own verdict by showing how the damage was assessed. Johnson *vs.* Allen, 101 N. C., 137; Jones *vs.* Parker, 97 N. C., 33; State *vs.* Royal, 90 N. C., 755. There was, therefore, no error in refusing to grant a new trial upon the affidavit setting forth information derived from jurors as to what occurred in their own private consultations. The truth of the allegation could not have been shown except by allowing one of the jurors to become a witness, and this the policy of the law will not permit."

For many years it was an open question whether the "laws of the several States" which the 34th section of the first judiciary act required the courts of the United States to regard as rules of decision, included the rules of evidence; but since Judge Taney's opinion in McNiel *vs.* Holbrook, 12 Pet., 84, 88-89, this court and all other courts have held that rules of evidence are a part of the "laws of the several States" within the meaning of that statute. But while McNiel *vs.*

Holbrook clearly established the doctrine that rules of evidence are a part of the "laws of the several States," there still remained the question as to whether those rules of evidence were such as had been established by the decisions of the highest court, as well as by statute, or were only such as had been established by statutes. On this latter question there is a direct conflict of authority between the Circuit Court of Appeals for the Seventh District and the Circuit Court of Appeals for the Eighth District, and I assume that a writ of certiorari was granted in this case for the purpose of settling that conflict.

In Union Pac. Ry. Co. *vs.* Yates, 79 Fed., 584, 588, the Circuit Court of Appeals for the Eighth Circuit held that while the Federal courts must follow the rules of evidence as established by statutes, they are not bound by the rules of evidence as laid down in the decisions of the highest court. In that case the opinion declares:

> "We concede it to be the law that the Federal courts sitting within a State must enforce the provisions of a local statute prescribing rules of evidence, unless the local statute is in conflict with some law of the United States regulating the same subject. McNiel *vs.* Holbrook, 12 Pet., 84, 88, 89; Wright *vs.* Bales, 2 Black, 535; Potter *vs.* Bank, 102 U. S., 163, 165. But the decisions of the courts of a State construing common-law rules of evidence are not obligatory on the Federal courts. Such decisions are merely persuasive authority, and, while the Federal courts will follow them when the question at issue is balanced with doubt, yet they will not be governed by such decisions when they appear to be at variance with the great weight of authority."

On the other hand, in Stewart *vs.* Morris, 89 Fed., 290, 291, the Circuit Court of Appeals for the Seventh Circuit held that the United States courts, sitting in any State, are bound by the rules of evidence prevailing in that State, whether those rules of evidence are established by statutes

or by the decisions of the highest court. In that case the opinion declares:

> "That the Federal courts sitting in a State will follow the decisions of the highest courts of the State concerning the rules of evidence has been more than once explicitly affirmed by the Supreme Court. In *Ex parte* Fisk, 113 U. S., 113; 5 Sup. Ct., 724, after quoting section 914 of the Revised Statutes, that court said: 'In addition to this, it has been often decided in this court that in actions at law in the courts of the United States the rules of evidence and the law of evidence generally of the States prevail in those courts.'"

There are other conflicting decisions of the inferior Federal courts on this question, but it is unnecessary to extend this brief by a quotation from them or a citation of them; and I pass to what I think are the controlling expressions to be found in more than one opinion of this court.

In Bucher *vs.* Cheshire R. R. Co., 125 U. S., 555, on page 583, Judge Miller, who delivered the opinion of the court, says:

> "It is also well settled that where a course of decisions, whether founded upon statutes or not, have become rules of property as laid down by the highest courts of the State, by which is meant those rules governing the descent, transfer, or sale of property, and the rules which affect the title and possession thereto, they are to be treated as laws of that State by the Federal courts."
>
> "The principle of that rule also applies to rules of evidence. In *Ex parte* Fisk, 113 U. S., 713, 720, the court said: 'It has been often decided in this court that in actions at law in the courts of the United States, the rules of evidence and the law of evidence generally of the States prevail in those courts.'"

In Gormley *vs.* Clark, 134 U. S., 338, Mr. Chief Justice Fuller delivered the opinion, and on page 348 he declares:

> "Upon the construction of the constitution and laws of a State, this court, as a general rule, follows the decisions of her highest court, unless they conflict with or impair the efficacy of some provision of the Federal Constitution, or of a Federal statute, or a rule of general commercial law. Norton *vs.* Shelby County, 118 U. S., 425, 439. And this is so where a course of those decisions, whether founded on statutes or not, have become rules of property within the State; also in regard to rules of evidence in actions at law; and also in reference to the common law of the State, and its laws and customs of a local character when established by repeated decisions. Burgess *vs.* Seligman, 107 U. S., 20; Bucher *vs.* Cheshire Railroad Company, 125 U. S., 555."

In Nashua Savings Bank *vs.* Anglo-American Land Co., 189 U. S., 221, Mr. Justice Brown, who delivered the opinion of the court, on page 228, says:

> "The 'laws of the several States' with respect to evidence within the meaning of this section apply not only to the statutes, but to the decisions of their highest courts. Bucher *vs.* Cheshire Railroad Co., 125 U. S., 555, 582; *Ex parte* Fisk, 113 U. S., 713, 720; Ryan *vs.* Bindley, 1 Wall., 66."

Ex parte Fisk, 113 U. S., 713, has also been cited in support of this doctrine, and Judge Miller, who delivered the opinions both in the Fisk case and in Bucher *vs.* Cheshire R. R. Co., cites the former case in support of his opinion in the latter. I shall not, however, trouble the court by asking it to read the Fisk case, because while I think that part of the opinion which was quoted in the Bucher case was clearly meant to support the doctrine that the opinions of the highest courts, as well as statutes, establish the law of evidence in the several States (and I am confirmed in that opinion by the fact that Judge Miller delivered both opinions), still I recognize that the Fisk case turned on a statute of the State of New York, and, therefore, what was said in the opinion was not necessary to a decision of the case.

II.

EVEN IF A COURT OF THE UNITED STATES SITTING IN NORTH CAROLINA IS NOT BOUND BY THE DECISION OF THE HIGHEST COURT IN THAT STATE ON THAT QUESTION, THE TESTIMONY OF JURORS TO SHOW THAT THEY HAD RENDERED A "QUOTIENT VERDICT" WAS INADMISSIBLE ACCORDING TO THE OVERWHELMING WEIGHT OF AUTHORITY, AND SUCH TESTIMONY WAS, THEREFORE, PROPERLY EXCLUDED BY THE TRIAL COURT.

Thompson, in his work on Trials, after discussing the "quotient verdict" and declaring it illegal, says:

> "But while this misconduct was pronounced by a great judge to be a very high misdemeanor, yet the law is in such an incongruous state that it will not, on a supposed ground of public policy, allow the fact to be shown by the only evidence by which, in general, it can be, viz., the affidavits of jurors themselves."
>
> Thompson on Trials, vol. 5, 2d ed., sec. 2603.

In Wigmore on Evidence the law is thus stated:

> "The doctrine of Lord Mansfield was so rapidly accepted that most of the courts had committed themselves upon the subject long before the opinion of Mr. Justice Cole of Iowa, in 1866, was delivered. The exposition of Mr. Justice White, in Tennessee, in 1821, which had accurately pointed out the true nature of the innovation, seems to have received no consideration from other courts. Except in six jurisdictions, where the rule of Iowa is accepted, the rule of Lord Mansfield seems now too firmly settled in most jurisdictions to be repudiated by judicial decision." Vol. 4, section 2354.

It is unnecessary, of course, for me to say that "the doctrine of Lord Mansfield" to which Wigmore refers is

that declared in Vaise *vs.* Delaval, holding that the affidavits or testimony of jurors cannot be received to impeach their verdict.

In a note the author specifies the "six jurisdictions where the rule of Iowa is accepted" as "Iowa, Kansas, Nebraska, Tennessee, Texas (criminal cases), and Federal courts." Since that note was written the number of States in which the testimony of jurors will be received to impeach their verdict has been enlarged by statute. For instance, the testimony of jurors, according to that note, would be received by the courts of Texas only in criminal cases, and the Supreme Court of Texas had expressly decided in I. & G. N. *vs.* Gordon, 72 Tex., 44, 51-52, that the testimony of a juror was not admissible in a civil case to show a "quotient verdict"; but since that decision Texas has provided, by express statute, that such testimony may be received in all cases.

It is true that both Thompson and Wigmore condemn the rule against receiving the affidavits of jurors to impeach their verdict, but they both concede that it is firmly established; and Wigmore very pertinently suggests that the courts could properly hold that a "quotient verdict" is not such misconduct of the jury as requires a new trial.

The American Digest, volume 37, column 1306, states the law thus:

> "Affidavits and testimony showing that the jury arrived at their verdict by adding together twelve different sums and dividing by twelve, the result being the amount of the verdict rendered, cannot be received to impeach the verdict."

It is to be understood, of course, that the "affidavits and testimony" referred to above were the affidavits and testimony of the jurors.

In a note, under section 2603, volume 2, Thompson on Trials, many decisions are cited in support of his text; Wigmore, in an elaborate note, under section 2354, volume 4, collects and cites the cases by States; and the American

Digest also supports its statement of the law by numerous authorities. It is safe to say that in practically all of the States, except where it is otherwise provided by statute, the testimony of jurors is not competent to prove a "quotient verdict."

In my examination, which has not been anything like so thorough as I would have thought necessary had I regarded the question as a doubtful one, I have found only three opinions of this court in which the admissibility of a juror's testimony to impeach his verdict has been considered, and it happens that all of those opinions were delivered in criminal cases.

In Reid *et al. vs.* The United States, 12 How., 361, 366, the affidavits of two jurors were offered, on a motion for a new trial, to prove that one of the jurors had read a newspaper containing a report of the evidence in that case. Judge Taney, who delivered the opinion of the court, held that it was not necessary to say whether those affidavits ought to have been received or rejected. He said:

> "It is, however, unnecessary to lay down any rule in this case or examine the decisions referred to in the argument. Because we are of the opinion that the facts proved by the jurors, if proved by unquestioned testimony, would be no ground for a new trial."

In Clyde Mattox *vs.* The United States, 146 U. S., 140, the affidavits of three jurors were offered, on the motion for a new trial, to prove certain statements made in the presence of the jury by the bailiff, and the affidavits of eight jurors were offered to prove that a newspaper containing an account of the trial, highly prejudicial to the defendant, was introduced into the jury room and read to the jury. The trial court excluded those affidavits, and this court held that in doing so it had committed a reversible error.

In Hyde *vs.* The United States, 225 U. S., 347, 382, the motion for a new trial alleged:

> "The verdict was the result of an agreement between certain of the jurors who believed all of the defendants should be convicted and certain jurors who believed that all of the defendants should be acquitted, by which agreement the acquittal of Benson was exchanged for the conviction of Hyde and the conviction of Schneider for the acquittal of Dimond."

But this court held that the testimony of jurors could not be received to support that allegation, and that the trial court had not erred in excluding it.

It will be observed that in Reid *et al. vs.* The United States the misconduct charged was the introduction of a newspaper into a jury room; and in Clyde Mattox *vs.* The United States the same misconduct was charged, supplemented by a further charge of misconduct on the part of the bailiff in charge of the jury. In the Reid case the court found it unnecessary to decide whether the affidavits of the jurors ought to have been received; and in the Mattox case the court held that the trial court erred in excluding them. It is proper to say that the Mattox case was also reversed because the trial court committed an error in excluding certain statements made by the deceased just before his death. The misconduct in both the Reid case and the Mattox case was not precisely the misconduct of the jury, and hardly falls within the rule which should govern the admissibility of a juror's testimony in a civil case, where the charge, and the only charge, is with respect to the manner in which the jury arrived at its verdict.

Hyde *vs.* The United States approaches very much more closely the case at bar than the Reid case or the Mattox case, because the motion for a new trial there distinctly and only charged a misconduct on the part of the jury. Certainly it is a graver offense for jurors to vote for the conviction of two defendants in order to secure the acquittal of two other defendants than it is for a jury to determine the amount of a recovery in a civil case by the average method; and I feel

warranted in saying that if this court properly decided in the Hyde case that the testimony of jurors could not be received to show that they exchanged the conviction of two defendants for the acquittal of two others, then certainly it must decide that the affidavits of jurors cannot be received to prove a "quotient verdict" in a civil case. I do not forget that there was a dissenting opinion in the Hyde case, but that dissent was based on another ground and did not touch this particular question.

The general question of how far the affidavits or testimony of jurors may be received to impeach their verdict has been frequently passed upon by the inferior Federal courts, but I have found only one case, decided before this, in which the admissibility of the jurors' testimony to prove a "quotient verdict" has been presented. In Consolidated Ice-Mach. Co. *vs.* Trenton Hygeian Ice Co., 57 Fed., 898, one of the grounds upon which the motion for a new trial was predicated was that the jury had returned a "quotient verdict"; and Judge Green, after indicating that the verdict in that case had not been reached under an antecedent agreement to be bound by it, and was not, therefore, obnoxious to the objection generally made against a "quotient verdict," said:

> "But, even if it were so objectionable, the only evidence that the verdict was arrived at in this manner is the affidavit of one of the jurors who was himself guilty of the alleged misconduct, if it was misconduct. Such an affidavit from a juror cannot be received to impeach his verdict, or to show what transpired in the jury room among his fellow-jurors while engaged in the consideration of the case in question. Public policy, sound reason, are wholly against it. To admit such evidence would tend to defeat the solemn act of the jury, done under the solemn obligation of an oath publicly taken in a court room, and would open the door widely to iniquitous influences, resulting always in injustice. It must be rejected. There is absolutely, therefore, no legal evidence before the

court that the verdict in this case was arrived at in any other manner than fairly and justly; hence this reason falls to the ground."

I would regard it as an unnecessary tax upon the time of this court to say more, and I respectfully submit that the judgment in this case ought to be affirmed.

JOSEPH W. BAILEY,
Attorney for Respondents.

McDONALD AND UNITED STATES FIDELITY AND GUARANTY COMPANY *v.* PLESS.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

No. 283. Argued May 13, 1915.—Decided June 14, 1915.

The Conformity Act—Rev. Stat., § 914—does not apply to the power of the court to inquire into the conduct of jurors. The courts of each jurisdiction, state and Federal, must be in a position to adopt and enforce their own self-preserving rules.

While Rev. Stat., § 914, does not apply in this case, this court recognises the same policy that has been declared by that court and by the courts in England and in most of the States of the Union, that the testimony of a juror may not be received to prove the misconduct of himself or his colleagues in reaching a verdict.

The rule, endorsed by this court in this case, that a juror may not impeach his own verdict is based upon controlling considerations of public policy which in such cases chooses the lesser of two evils.

While jurors should not reach a verdict by lot, or, as in this case, by averaging the amounts suggested by each, the verdict may not be set aside on the testimony of a juror as to his misconduct or that of his colleagues.

206 Fed. Rep. 263, affirmed.

THE facts, which involve the validity of a verdict and judgment of the Circuit Court of the United States in an action for services, are stated in the opinion.

Mr. Julius C. Martin, with whom *Mr. Thos. S. Rollins* and *Mr. Geo. H. Wright* were on the brief, for petitioners.

Mr. Joseph W. Bailey for respondents.

MR. JUSTICE LAMAR delivered the opinion of the court.

Pless & Winbourne, Attorneys at Law, brought suit in the Superior Court of McDowell County, North Carolina, against McDonald to recover $4,000 alleged to be due them for legal services. The case was removed to the then Circuit Court of the United States for the Western District of North Carolina. There was a trial in which the jury returned a verdict for $2,916 in favor of Pless & Winbourne. The defendant McDonald moved to set aside the verdict on the ground that when the jury retired the Foreman suggested that each juror should write down what he thought the plaintiffs were entitled to recover, that the aggregate of these amounts should be divided by 12 and that the quotient should be the verdict to be returned to the court. To this suggestion all assented.

The motion further averred that when the figures were read out it was found that one juror was in favor of giving plaintiffs nothing, eight named sums ranging from $500 to $4,000 and three put down $5,000. A part of the jury objected to using $5,000 as one of the factors inasmuch as the plaintiffs were only suing for $4,000. But the three insisted that they had as much right to name a sum above $4,000 as the others had to vote for an amount less than that set out in the declaration. The various amounts were then added up and divided by 12. But by reason of including the three items of $5,000 the quotient was so much larger than had been expected that much dissatisfaction with the result was expressed by some of the jury. Others however insisted on standing by the bargain and

the protesting jurors finally yielded to the argument that they were bound by the previous agreement, and the quotient verdict was rendered accordingly.

The defendant further alleged in his motion that the jurors refused to file an affidavit but stated that they were willing to testify to the facts alleged, provided the court thought it proper that they should do so. At the hearing of the motion one of the jurors was sworn as a witness, but the court refused to allow him to testify on the ground that a juror was incompetent to impeach his own verdict. That ruling was affirmed by the Court of Appeals. (206 Fed. Rep. 263.) The case was then brought here by writ of error.

On the argument here it was suggested that it was not necessary to consider the question involved as an original proposition, since the decision of the Federal court was in accordance with the rule in North Carolina (*Purcell* v. *Railroad Co.*, 119 N. Car. 739) and therefore binding under Rev. Stat., § 914, which requires that 'the practice, pleadings, and forms and modes of procedure in the Federal courts shall conform as near as may be to those existing in the State within which such Federal courts are held.' But neither in letter nor in spirit does the Conformity Act apply to the power of the court to inquire into the conduct of jurors who had been summoned to perform a duty in the administration of justice and who, for the time being, were officers of the court. The conduct of parties, witnesses and counsel in a case, as well as the conduct of the jurors and officers of the court may be of such a character as not only to defeat the rights of litigants but it may directly affect the administration of public justice. In the very nature of things the courts of each jurisdiction must each be in a position to adopt and enforce their own self-preserving rules. *Nudd* v. *Burrows*, 91 U. S. 427 (4), 441; *Railroad Co.* v. *Horst*, 93 U. S. 291, 300; *Grimes Co.* v. *Malcom*, 164 U. S. 483, 490; *Lincoln* v. *Power*, 151 U. S.

436, 442; *Burgess* v. *Seligman*, 107 U. S. 20, 33; *Liverpool &c. Co.* v. *Friedman*, 133 Fed. Rep. 716.

But though Rev. Stat., § 914, does not make the North Carolina decisions controlling in the Federal court held in that State, we recognize the same public policy which has been declared by that court by those in England and most of the American States. For while by statute in a few jurisdictions, and by decisions in others, the affidavit of a juror may be received to prove the misconduct of himself and his fellows, the weight of authority is that a juror cannot impeach his own verdict. The rule is based upon controlling considerations of a public policy which in these cases chooses the lesser of two evils. When the affidavit of a juror, as to the misconduct of himself or the other members of the jury, is made the basis of a motion for a new trial the court must choose between redressing the injury of the private litigant and inflicting the public injury which would result if jurors were permitted to testify as to what had happened in the jury room.

These two conflicting considerations are illustrated in the present case. If the facts were as stated in the affidavit, the jury adopted an arbitrary and unjust method in arriving at their verdict, and the defendant ought to have had relief, if the facts could have been proved by witnesses who were competent to testify in a proceeding to set aside the verdict. But let it once be established that verdicts solemnly made and publicly returned into court can be attacked and set aside on the testimony of those who took part in their publication and all verdicts could be, and many would be, followed by an inquiry in the hope of discovering something which might invalidate the finding. Jurors would be harassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a verdict. If evidence thus secured could be thus used, the result would be to make what was intended

to be a private deliberation, the constant subject of public investigation—to the destruction of all frankness and freedom of discussion and conference.

The rule on the subject has varied. Prior to 1785 a juror's testimony in such cases was sometimes received though always with great caution. In that year Lord Mansfield, in *Vaise* v. *Delaval*, 1 T. R. 11 refused to receive the affidavit of jurors to prove that their verdict had been made by lot. That ruling soon came to be almost universally followed in England and in this country. Subsequently, by statute in some States, and by decisions in a few others, the juror's affidavit as to an overt act of misconduct, which was capable of being controverted by other jurors, was made admissible. And, of course, the argument in favor of receiving such evidence is not only very strong but unanswerable—when looked at solely from the standpoint of the private party who has been wronged by such misconduct. The argument, however, has not been sufficiently convincing to induce legislatures generally to repeal or to modify the rule. For, while it may often exclude the only possible evidence of misconduct, a change in the rule "would open the door to the most pernicious arts and tampering with jurors." "The practice would be replete with dangerous consequences." "It would lead to the grossest fraud and abuse" and "no verdict would be safe." *Cluggage* v. *Swan*, 4 Binn. 155; *Straker* v. *Graham*, 4 M. & W. 721.

There are only three instances in which the subject has been before this court. In *United States* v. *Reid*, 12 How. 361, 366, the question, though raised, was not decided because not necessary for the determination of the case. In *Clyde Mattox* v. *United States*, 146 U. S. 140, 148, such evidence was received to show that newspaper comments on a pending capital case had been read by the jurors. Both of those decisions recognize that it would not be safe to lay down any inflexible rule because there

might be instances in which such testimony of the juror could not be excluded without "violating the plainest principles of justice." This might occur in the gravest and most important cases; and without attempting to define the exceptions, or to determine how far such evidence might be received by the judge on his own motion, it is safe to say that there is nothing in the nature of the present case warranting a departure from what is unquestionably the general rule, that the losing party cannot, in order to secure a new trial, use the testimony of jurors to impeach their verdict. The principle was recognized and applied in *Hyde* v. *United States*, 225 U. S. 347, which, notwithstanding an alleged difference in the facts, is applicable here.

The suggestion that, if this be the true rule, then jurors could not be witnesses in criminal cases, or in contempt proceedings brought to punish the wrongdoers is without foundation. For the principle is limited to those instances in which a private party seeks to use a juror as a witness to impeach the verdict.

Judgment affirmed.